CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM, 1823.

East'n District.
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DES BOULETS.
vs.
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DES BOULETS vs. *GRAVIER.*

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client. The judge sustained the exception, but on what grounds we do not know, and we notice the proceeding because we are unable to gather from the record what part of the answer was stricken out, or how it was amended, or on what issue the parties went to trial. There was judgment against the defendant, and he appealed.

An objection has been made to the appeal bond, because it is therein stated that the appellant had filed his appeal *in a suit*, instead of saying he had appealed *from a judgment*. We do not see that these expressions could have at all affected the right of the appellee, to put the bond in suit, and inforce the payment of it, had the appellant failed in his appeal, and we are therefore of opinion that the objection is not well taken.

The main, indeed the only question in the cause, is whether the vendee of a moveable, where the contract is to be reduced to writing, can retract, at any time before the act is signed, and that, although he should be in possession of the thing purchased.

The authorities are express that if the parties agree that the contract is to be reduced to

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writing, it is not complete until that writing is made and signed. *Febr. par.* 1, *chap.* 7, *sec.* 1, *no.* 19. *Curia Phill. Com. Terres, lib.* 1, *chap.* 12, *no.* 42. 3 *Martin*, 43. *Partida*, 5. 5. 6, and they make no distinction between the sale of moveables and immoveables.

Nor do we think that the fact of Gravier having acknowledged himself to be in possession of the schooner, by directing the person who had her in charge, to take care of her for him, can prevent the application of the principle to the case before us. We regard this fact of possession, as one of those circumstances which, coupled with others, would have made the sale complete, if there had been no agreement to put it in writing. But when that agreement exists, the necessity of complying with it, arises from the parties having added that condition, to the other things required to make a legal contract. No case indeed, could occur, where the operation of the privilege of law here invoked could be examined, unless the contract was complete, independent of its being reduced to writing, and we cannot distinguish between possession and consent, and price, and the other circumstances which would make the agreement binding.

Pothier, who states the general rule to be such as it is found in the authorities already referred to, adds, that it must appear to be the intention of the parties to make the perfection of the agreement depend on the writing, for, if it was merely contemplated to secure a more authentic mode of proof, then neither party can pretend the contract was not complete. *Pothier, traité des obligations, no.* 11. Such also appears to be the opinion of *Gregorio Lopez*, in his commentary on the law of the partida, already cited, 5, 5, 6. It is unnecessary for us to say whether we are prepared to go the whole length with these commentators; for, taking the rule with the modifications they have made, and testing this case by it, we are brought to the same result, as if we pursued the literal expression of the law.

Every witness, who is examined, declares that Gravier stated certain articles belonging to the schooner, to be wanting, and assigned that, as the reason why he would not comply with the contract. Moulon, and Savary, who were present, when the parties visited the vessel in the Bayou St. Jean, depose that the defendant asked the plaintiff for the sails and rigging, and that upon the latter promising to

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deliver them, the former observed, *the bargain was closed, and he would sign the act when he went to town.* The plaintiff not satisfied, told Gravier the vessel was at his charge; the latter acquiesced, and observed, when they went to town, *they would terminate th affair.* No proof has been given that these sails have been furnished by the plaintiff.

Now we see nothing in this evidence, but what we must meet with in nearly every case; namely, that the bargain was completed, by viewing the article, stipulating the price, and agreeing as to the delivery. It affords us no means of ascertaining the intention of the parties; for these things must always precede the agreement, to put the contract in writing. It is clear to us that the defendant did not conceive the agreement closed, and his expression that *he would terminate it* when he went to town, must have indicated to the plaintiff, he did not conceive *it finished then.* Such too, is the presumption, arising from the circumstance that every thing, embraced by the purchase of the schooner, was not delivered. It can hardly be supposed, that, without having viewed what he contracted for, the buyer should have intended to give his notes, and look afterwards to the

vendor's responsibility, for those objects which were wanting. Such cases we know do occur; but they are not in the usual course of trade, and, we must suppose the intention of the parties to be conformable to the ordinary transactions of men.

It is ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and that there be judgment for the defendant, with costs, in both courts.

Quemper for the plaintiff, *Young* for the defendant.

TOURO vs. *CUSHING.*

APPEAL from the court of the first district.

The service on the debtor of a copy of the assignment, is not essentially requisite, to vest the debt in the assignee. Notice to the former suffices.

MARTIN, J. delivered the opinion of the court. The plaintiff and intervening party claim the money in the hands of the garnishees, as the amount of a debt heretofore due to the defendant: the plaintiff as attaching creditor; and the intervening party, as assignee of the defendant. The intervening party prevailed in the district court and the plaintiff appealed

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The assignment is not denied; but it is contended that the debt was attached, before the assignee became legally possessed of it, as regards third persons.

The testimony shows that the assignee's agent (in New Orleans) gave notice of the assignment to the debtor, but did not give him a copy of the assignment.

The plaintiff's counsel insists that the property of the debt, notwithstanding this notice, remained in the defendant, did not pass to the assignee, and was consequently a proper object of attachment. He urges that the service of a copy of the assignment is necessary to vest the debt in the assignee, as regards third persons. *Civil Code*, 369, *art.* 122.

The difficulty results from the variance of the texts of the code. The French, invoked by the plaintiff, requires a *signification du titre*, i. e. the legal service of a copy of the assignment, while the English, resorted to by the assignee is satisfied by a *notice* to the debtor of the transfer.

These texts present two distinct ideas to the mind. In the case of *Gray* vs. *Trafion & als.* 12 *Martin*, 702, we thought that a compliance with *either* requisite, sufficed to vest the as-

signor's right in the assignee, as to third persons. A contrary decision would render our code a *decoy*, rather than a *beacon*. We see no reason to be dissatisfied with the former decision.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Morse for the plaintiff, *Grima* for the defendant.

BLANQUE'S SYNDIC vs. *BEALE'S EXS.*

APPEAL from the court of the first district.

The law in force in this country, at the change of government, on the subject of *cessio bonorum*, is not unconstitutional.

MARTIN, J. delivered the opinion of the court. The plaintiffs sue on a promissory note of the defendants' testator. The claim is resisted on the ground, that, in March 1812, after the note became payable, Beale was imprisoned, and obtained the benefit of the act of 1808-16, for the relief of actual debtors in custody, and, by a judgment of the superior court of the late territory, was discharged from custody, and from all and singular, the debts by him theretofore contracted. The defendants had judgment, and the plaintiffs appealed.

It is urged that the act of the territorial legislature, invoked by the defendants and appel-

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lees, inasmuch as it attempts to discharge a party from the *payment* of his debts, is unconstitutional and void.

This point appears to have been determined, by the supreme court of the United States, in a case, carried thither from the court of the United States for the Louisiana district, pronouncing the unconstitutionality of the law, which was affirmed.

But, independently of the territorial law, the debtor was entitled to his discharge, under the laws which prevailed here, before the cession.

El efecto de esta cesion de bienes es, que el que la hace, despues de hecha, no es obligado a responder en juicio, a los acreedores, a quien deba deudas—*Curia. Phill. p.* 2, § 25, *No.* 10.

By the third article of the treaty of cession, the enjoyment of the benefits of the constitution of the United States, by the inhabitants, is pospoued; hence the restrictions which it imposes do not take immediate effect, and the law of congress, which inhibited the territorial legislature from passing any law, contrary to the constitution of the United States, did work no repeal of those in force, at the time of its passage.

The reporter of the supreme court of the United States, in his note to the case of *Owings* vs. *Speed*, 5 *Wheaton*, 420, says, that, the provision of the constitution of the United States that, "no state *shall make* any law impairing the obligation of contracts," does not extend to a state law, enacted before the 4th of March, 1789, and operating upon rights of property, vested *before* that time. Hence it is inferred that it operates, in the case of a right vested *afterwards*. The facts of the case shew that the opinion is, according to them, to be so restrained; but there is not any thing, in what fell from the court, that induces a belief that they intended to make any distinction.

An inhibition to pass *new* laws, permitting the issue of paper money, making any thing a tender but gold or silver, imples an intention to tolerate the circulation of a paper currency, already emitted; and the existence of laws making specific articles a tender.

The state of North Carolina, at the adoption of the constitution of the United States, had hardly any metallic medium in circulation. All the gold and silver had disappeared before two large emissions of paper money in 1783 and 1784. Yet this paper continued a tender

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after the constitution went into operation, and if it has ceased to be so, it is by the complete redemption of it. On the establishment of banks, in that state, in 1805, a great struggle was made to compel these institutions to pay their notes in gold and silver; but it never entered the mind of any body that they could not, as well as private individuals, tender the paper currency to their creditors.

If this position be correct, the discharge of a debtor from a future liability for antecedent debts, on the surrender of his last farthing, under a law anterior to the act of congress, establishing a territorial legislature, is not to be prevented, by an inhibition to pass a law authorising it.

It is, therefore, ordered, and decreed that, the judgment of the court *a quâ* be affirmed with costs.

Morel for the plaintiff, *Duncan* for the defendants.

FLEITAS & AL. vs. *MAYOR AND ALDERMEN OF NEW ORLEANS.*

A complete grant prevails over an order of survey.

PORTER J. delivered the opinion of the court. The petitioners claim title to a tract of land,

in the rear of the city of N. Orleans, "containing two acres in front, on the space of sixty feet reserved on the canal Carondelet, by eighteen in depth," by virtue of a grant to Carlos Guardiola, dated the 20th of May, 1800, and a deed of sale from said Guardiola to their ancestor.

They aver that they have had peaceable possession of the property, until the mayor, alderman, and inhabitants of the city of New Orleans, on a certain day, in the month of April last past, entered into and took possession of a portion of the premises.

And they pray that, the mayor and aldermen may be directed to abate, and pull down the enclosures they have erected, and be enjoined from further disturbing the petitioners in the enjoyment of this land, and they demand one thousand dollars damages, for the injury they have already sustained.

The corporation plead to this petition the general issue, and that the land claimed makes part of a tract which they *bona fide* purchased, for a valuable consideration, from Bartholomew Macarty.

They pray that Macarty may be cited to

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defend the suit, and that they be dismissed with costs.

Macarty was cited and he appeared, and answered that he was the lawful owner of the premises, claimed by the petitioners, in virtue of a grant made to John Baptiste Macarty, his deceased father, by the baron Carondelet, on the 22d of December, 1795, the title to which was lost through accident, in the hands of the said baron Carondelet; and that he has acquired a complete right to this property, by the prescription of ten, twenty and thirty years.

On the pleadings, the first thing to be enquired into is the title of the plaintiff, and its location.

Both are clearly and satisfactorily made out. The petitioners shew that they are in all the right which Guardiola had; they exhibit a concession to him in form; and they establish its location, by a plat of survey, made by the surveyor general of the province of Louisiana, to which the title refers. Which location embraces the premises now in dispute between the parties.

The title which the defendant sets up is of an anterior date to that of the plaintiff, and if proved to be of equal dignity, must prevail in this contest.

The evidence, on which the defendants rely, to establish the existence of their title, consists entirely in the deposition of a certain Vicento Sebastian Vintado, formerly deputy surveyor-general of the province of Louisiana, now residing in the city of Havana, who has been most minutely interrogated, in respect to all the circumstances, attending the issuing of the title, and its loss.

The defendants seem to have been aware of the importance of establishing, that a complete grant issued to Macarty, and, as the opinion which we have formed on this point decides the cause, we shall refer to so much of the testimony, as will enable the view we have taken of it, to be clearly understood.

In the third and fourth interrogatories, put by the defendants to the witness, he is asked, (among other things,) if he has any knowledge of a grant having issued to J. B. Macarty, for a certain quantity of land, situated, &c. To that question he answers, that it is to his certain knowledge that J. B. Macarty obtained, from the Spanish government, a concession of land, (*una concession de tierras*) in the vicinity of New-Orleans, which he describes as being the premises now sued for.

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In the second interrogatory put, on the cross examination, he is asked, whether the grant, of which he speaks, had the seal of the government to it, and he answers that the said decree was not sealed, (*no estaba sellada dicho decreto*) nor was it necessary to be so, as the seal was only required to patents, dispatches, titles, or documents, which beginning by the name, style, title, dignity, and office of the governor, concluded by the counter signature of the secretary, after the signature and seal of the superior.

To the fourth interrogatory, the witness states that he cannot (as, indeed, it could hardly be expected he would) at this distance of time swear, what were the precise words of the grant; but in reply to the fifth question, whether it was a complete one, he declares, that, when he saw and had in his power *the concession*, he *considered it as the most legal and formal that could be made.* Without remarking on the great caution with which the answer is given, it is plain from the subsequent part of the reply to this same interrogatory, that what the deponent means by concession, [*concesion*] is not what we understand by a complete grant, and that the title, relied on by the defen-

dants, was not clothed with the formalities which made a complete one, under the former government of Louisiana.

He is asked, what were the formalities required and practised, at that time, in Louisiana, in granting lands, and he answers, with great accuracy, that, as it respects the lands purely royal [*realengas*] during the time that the governor had the power of granting them, they were given for settlement, and the formalities were very simple, without prejudice to their authenticity. They were confined to decreeing the petition; (which generally exhibited, the previous attestation of the lands being vacant that were solicited) ordering that the surveyor-general, or an individual whom he might nominate, should establish the party soliciting, upon such an extent of land being vacant, and doing no injury to the surrounding occupants. With a similar precaution, concluding, by ordering the surveyor to make out the survey, and remit it to government, in order to furnish the person, in whose favor it was made, with a corresponding title in form. The survey being finished, and a figurative plan being made out, and the process verbal, or certificate of there being no opposition being extended, the

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government enregistered the whole in a paper book in the office, numbering the plan and documents dispatched, the whole of which was copied in the register, and generally preserving the original decrees. Upon which, the title in form (*el titulo en forma*) was made out, and the seal was put to it.

It is impossible to compare this part of the witness' testimony, with that, in which he speaks of the various circumstances which attended the issuing of the title to Macarty, and not feel that the *concesion*, as it is called, had not ripened into a complete grant; but if there be a doubt, there can be none, when we refer to the answer to the second interrogatory. He there tells us, in express terms, that no seal was annexed to the title given to the defendants' grantor. We have it from himself, however, (what we know otherwise to be a fact) that complete grants, [*titulos en forma*] had the governor's seal to them; and hence we conclude Macarty's was not one of that description.

Independent of the proof of the nature of the title of the defendants, which we consider conclusive, it is evident from the terms used by the witness when speaking of it, that he was alluding to an order of survey. He calls it *conce-*

sion, decreto; when he speaks of that which issues after a completion of the formalities required by law, he uses the term, *titulo en forma.*

We observe that the fifth cross interrogatory, which asked the witness whether the *grant was complete,* was translated *completa concesion,* and that his answer was, he considered the concession [*la concesion*] as complete a one as could be made. We do not doubt that it was as complete an order of survey as could have been made, and the witness, taking the question as translated, might well have answered as he did; for we have already seen that he attaches quite a different meaning to the word, from that which belongs to the term *titulo en forma.*

Our examination of the testimony having thus brought us to the the conclusion, that, the title, under which the defendants hold, is not a complete grant, the plaintiffs', which is one of that description, must prevail.

This view of the question renders it unnecessary to examine the object which the governor had, in getting the title back into his hands, and what were the legal consequences of his neglecting or refusing to give it up. *White* vs. *Well's Exrs.* 5 *Martin,* 652.

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The plea of prescription does not appear to be sustained: the possession of the defendants, is not found to have been different from that of the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiffs do recvoer of the defendants, the land mentioned in the petition; and it is further ordered, adjudged and decreed, that this case be remanded to ascertain the damages which the defendants are entitled to receive for their vendor cited in warranty; and it is further ordered, that the appellees pay the costs of the appeal.

Livingston for the plaintiffs, *Moreau* for the defendants.

S. J. PECQUET & AL. vs. *W. GOLIS.*

Several creditors, standing in the same predicament, and seeking the same relief, may join in one application.

APPEAL from the court of the parish and city of New Orleans.

MARTIN J, delivered the opinion of the court. The petition states that the applicants are respectively creditors of Golis, who has

obtained a respite; that they are informed and believe he has fraudulently and clandestinely disposed of a great part of his goods, and is preparing fraudulently to depart from the state. They pray for his arrest, and attachment of his property. On this affidavit, the parish judge ordered the arrest and attachment, which were executed.

Golis introduced witnesses to disprove the allegations in the petition—the judge ordered a valuation of the goods, but directed him to "remain under bail, with good and sufficient security, for the amount of the claims of the plaintiffs, as detailed in the petition, not to leave the state or the jurisdiction of the court, until he has successively complied with the terms of the respite." He appealed.

One, who has obtained a respite, and meditates a removal, may be arrested and his goods seized.

When he is brought before the judge, his person and goods may be secured, notwithstanding a defect, in the process on which he was arrested.

1. His counsel urges that creditors whose claims are not connected, have no right to cumulate their actions—11 *Martin*, 287.

2. If they sue him, in behalf of his other creditors, they must set forth their authority—5 *Nouveau Denissart*, 685, *no.* 9, *Varbo Creance.*

3. The petition must set forth the cause of action, and conclude with a prayer for relief, adapted to the circumstances of the case—2 *Martin's Digest*, 156.

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4. Except in the case of a voluntary surrender, the creditor must select between arrest and attachment. The remedies cannot be cumulated—*Acts of* 1817, 130, § 9.

5. The allegations are insufficient to warrant either—1 *Martin's Digest*, 474, 480, 482, 512, *Acts of* 1817, *p.* 26.

6 The judge's order for the arrest, should have stated the particular suit, in which surety was to be given—*Id.* 476,480,482.

7. The writ of attachment should not be at variance with the evidence of the debt set forth in the petition—*Id.* 514.

I. II. This does not appear to be a regular suit, in which the defendant was to be called on to answer. It was an application at chambers, for surety, in the case of creditors whose debts were not payable. It might have been made by the creditors severally, and we do not see how several of them, standing in the same predicament, and seeking the same relief, could not join in the application.

III. The petition concludes with a prayer adapted to the case; the arrest of the debtor and the attachment of his goods.

IV. Persons who obtain a respite, fall into

the class of bankrupts, *Fallidos*, and when they are suspected of meditating a removal, *siendo sospchoso d fuga*, may be arrested and his goods seized, *ha de ser preso y sequestrados sus biens—Cur. Phil Fallidos*, 3–23.

V. The allegations appear to us sufficient. The fraudulent intention to depart is sufficiently stated. The applicants swear they are informed of, and truly believe it.

VI. VII. The debtor being once before the judge, it was the duty of the latter to secure his person or his goods—or both; even if there had been any imperfection in the process, by which he was brought before him.

As to the question of fact, the discretion of the judge does not appear to us to have been improperly exercised. In a case like the present, fraud is presumed, and no great injury was done in holding the debtor to the security he had given.

When a debtor, who has obtained a respite, gives room to suspect him of an intention to depart, he cannot avail himself of the respite. He may be treated as a bankrupt—*Cur. Phil. Esperas y quitas, no.* 9.

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It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Cuvillier for the plaintiffs, *Trabuc* for the defendant.

BARLOW vs. *DUPUY.*

The record of a suit is legal evidence, altho' proceedings were not continued till a judgment was had.

APPEAL from the court of the third district.

MARTIN J. delivered the opinion of the court. The plaintiff seeks damages, on account of injury sustained, by the negligence of the defendant's deputy, in the execution and return of a writ of sequestration. The jury gave a verdict in his favor, without assessing any damages, and the court gave those claimed in the petition.

Our attention is drawn to a bill of exceptions to the opinion of the court, in admitting in evidence the proceedings in the suit of the plaintiff against Pemberton, in which he obtained the writ of sequestration, mentioned in the petition. The admission of the record was opposed, on the ground that the suit was not proceeded on to judgment. We are of opinion that the court acted correctly. The record

was the proper evidence to prove *rem ipsam*, viz: that the writ of sequestration was obtained.

But the judge certainly erred in giving judgment for damages, when not assessed by the jury, nor proven.

The judgment is annulled, avoided and reversed, and the cause remanded for a new trial.

This renders it necessary to examine the bills of exceptions to the opini n of the court, on the part of the plaintiff.

The first is to the rejection of a witness to prove that he was the overseer of the party against whom he had obtained the writ of sequestration. In this, we think, the court erred. The evidence was necessary to establish the damages claimed.

Another bill of exceptions is to the refusal to admit in evidence, an order of the same person, authorising the plaintiff to sell a certain horse, which it was contended by the defendant, had accordingly been sold, and by the plaintiff, to be still the property of the defendant, in the writ of sequestration. As the writ commanded the sequestration of the crop only, we do not think the court erred.

The other is to the rejection of a paper, a

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copy of which does not come up with the record, and nothing enables us to ascertain whether the court was correct, or erred in rejecting it.

It is therefore ordered that the judge be directed to admit in evidence the record of the proceedings in the case of Barlow *vs.* Pemberton, and that the plaintiff and appellee pay the costs of this appeal.

Livingston for the plaintiff.

DURHAM vs. *ODDIE.*

A power to sell does not include that of giving in payment;

APPEAL from the court of the first district.

MATTHEWS, J. delivered the opinion of the court. This case differs so little from that of *Thurett* vs. *Jenkins*, heretofore decided, as reported in 9 *Martin*, 318; and the slight variance between the two, being in favor of the present plaintiff, that unless we overturn the whole doctrine of the common law, or *leges non scriptæ* of England, as recognized in the former case, judgment must be rendered for the appellant. The counsel for the appellee

seems to have been so well convinced that his client must fail in his claim, provided the obstacles opposed to him, by the principles established in the former case, could not be removed, that he has directed his arguments, principally against the legal correctness of the decision therein given, on the ground that the court mistook the common law, as adopted in New York; being that which ought to have governed in that case, as well as in the present.

On examining the authorities cited, we find nothing in them tending to the establishment of rules, different from those laid down in the books relied on by the parties, in the case of *Thurett* vs. *Jenkins*; except an apparent contradiction or discrepancy, between the two cases to which we are referred in the 4th and 12th *vols.* of *Mass. Reports.*

It is very possible that this apparent repugnance between those cases might be reconciled; but we deem it to be no part of our duty to undertake the task. We do enough, if we avoid contradiction, and decide according to law, or what we honestly believe to be law, all cases regularly brought before us for adjudication.

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In relation to the extent and validity of the plaintiff's title to the ship, which forms the object of the present contest between the parties litigant, as it is exhibited by the evidence of the cause, we refer freely to the reasoning, in the case cited from *Martin's Reports*, which we still consider sound, and unshaken by the arguments and authorities now adduced. If any doubt or difficulty could remain, after the uncontradicted assertion of judge Parsons, that no difference existed in the United States between, what they term in England, the *grand bill of sale*, and the ordinary bill by which ships are transferred from one person to another: the evidence in the present case goes far in removing such difficulty; for Durham's vendor delivered to him the evidence of title, by which he (the seller) held from Garnis, who (for any thing that appears to the contrary) was the original owner of the vessel. Another point of view, in which this case may be considered, renders the plaintiff's claim much stronger than that of the claimant in the case above cited. The present defendant claims, under an act of sale, executed by an attorney in fact, for the original proprietor. There is no proof of any person having been

paid, and to supply this defect in the transfer of property, evidence is introduced to show that Oddie was, at the time of the pretended sale, a creditor of the owner for whom the attorney acted. The power of attorney shews that Smith, the agent, was authorised to sell three fourths of the ship. But the manner in which he appears to have disposed of the whole vessel appears rather to be a *dation en paiment*, than a contract of sale. This species of contract, although it strongly resembles a sale, is not precisely the same thing; and we are of opinion that, a simple power to sell, will not authorise an agent to give the thing intended to be sold, in payment of the debts of his constituent. The defendant, therefore, has shewn no legal title to the vessel in dispute. The plaintiff, we think, has; and, therefore,

It is ordered, adjudged and decreed, that, the judgment of the district court be annulled, avoided and reversed, and that judgment be entered for the plaintiff, with costs, in both courts.

Grymes for the plaintiff, *Livingston* for the defendant.

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APPEAL from the court of the first district.

The costs of a suit include all the charges which the law allows.

MARTIN, J delivered the opinion of the court. The defendant complains of the judgment of the district court, taxing as a part of the costs which she is to pay, the compensation to the experts for valuing the work performed by the plaintiff's testator.

Her counsel urges that this compensation cannot be considered as a part of the ordinary costs of the suit; that it is occasioned by the act of the plaintiff's testator; which induced this court to deny him any interest, except from the date of the judgment; the plaintiff should, therefore, pay at least one half of the expenses, if not the whole.

It does not appear to us that the district judge erred in dissallowing the claim of the defendant and appellee.

The costs of a suit, include all the charges which the law allows (even when not ascertained by law, but left to be assessed by the court) to defray the expenses necessary to arrive at a final decision of the suit. Experts are a kind of witnesses sent by the court, on the premises, to view the work, and report to the

court, the manner in which it is executed, and its valuation. This compensation constitutes a part of the costs; in the same manner as that of witnesses, whose attendance is required in court. The party, who requires his adversary to administer legal proof of his demand, must pay (if he fail) the costs attending the production of that proof.

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LAFON'S EX'S. *vs.* RIVIERE'S EX'X

It is, therefore, ordered, adjudged and decreed, that, the judgment of the district court be affirmed with costs.

Hennen for the plaintiffs, *Seghers* for the defendant.

MARQUEZ vs. *VISOSO.*

APPEAL from the court of the parish and city of New Orleans.

The partner, who alleges losses, must prove them.

MARTIN, J. delivered the opinion of the court. The plaintiff charges he advanced to the defendant 500 dollars, to be improved in a manufacture of segars, and was to participate therein for one half the profits and losses; that the defendant made great profits, but absolutely refuses to render any account or pay any part of the profits, and reimburse the capital. The defendant pleaded the general

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issue, and that the partnership suffered losses instead of making any profit.

The case was sent to referees, who reported their inability, on the accounts produced by the defendant, to pronounce on the merits. The court gave judgment for the plaintiff for 1200 dollars, with interest from the institution of the suit; the defendant appealed.

The testimony is voluminous and contradictory, and although it appears the parish court made a very full allowance to the plaintiff for his part of the probable profits; yet, as the defendant might, it was his duty to, have placed the affairs of the concern before the court, in a clear point of view, as he had the whole management of the partnership concerns, and the plaintiff did not interfere therein, we think the judgment ought not to be disturbed. Profits are always presumed, and the partner who has conducted the affairs and alleges losses, must establish them—*Cur. Phil. Companeros*, *no.* 16.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Derbigny for the plaintiff, *Mazureau* for the defendant.

DELERY vs. *BUNLE'S UNDER-TUTOR.*

East'n District. *July*, 1823.

DELERY *vs.* BUNLE, &c.

A party to a sale, cannot prove its simulation by *parolé*

APPAL from the ct. [illegible] nd district.

MARTIN, J. delivered the opinion of the court. The object of this suit is the rescission of the sale of certain slaves, made to the plaintiff by the minor's father, and the consequent cancelling of the note, given by the vendee for the price, on the ground of simulation. The under-tutor is sued, because the plaintiff is himself the minor's tutor. The plea was the general issue; the judgment was for the defendant; and the plaintiff appealed.

The statement of facts shews strong evidence of the simulation.

The district court's attention was first arrested on the question "can parol evidence be received to prove simulation in a sale?" It declared that, from the decision of this court, it had no doubt in deciding the question in the affirmative, the doctrine being laid down in the case of *Crozet's heirs* vs. *Gaudet*, 6 *Martin*, 524, and the appellant's counsel has referred us to that of *Griffin's Exr.* vs. *Lopez*, 5 *id.* 145.

It is clear that the question, as put by the

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judge, could not have been answered in the negative.

The case of *Crozet's heirs* vs. *Gaudet* differs widely from this. There the plaintiffs sought relief against a simulated sale, made in fraud of their rights. They were permitted to prove the simulation by witnesses, as it could not be imputed to them that no counter letter was taken.

In the case of the executors of Griffin, a counter-letter had been taken, and on proof of its destruction, parol evidence of its contents was admitted.

In the first case, parol evidence was given by persons, who were not parties to the sale alleged to be simulated. Here, in the one under consideration, the person who offered the parol proof was a party to the sale, and might have armed himself with a counter letter.

In the second case, the parol proof was restrained to the contents of the counter letter. Here, it is introduced to prove facts, the existence of which was never put to writing.

We conclude that the district court erred, in receiving as legal evidence of the simulation of a written sale, parol evidence offered by the

vendee, in whose power it was to have armed himself with a counter-letter.

This conclusion renders it unnecessary to examine the other questions in the case. The district court, however, came to the same result to which our view of the case leads us.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

Moreau & Dumoulin for the plaintiff, *Desblieux* for the defendant.

SEGHERS vs. *HIS CREDITORS.*

APPEAL from the court of the first district.

A syndic who becomes insolvent, may be removed and another appointed in his stead.

PORTER, J. delivered the opinion of the court. Desbois, one of the syndics of this estate, having become insolvent since his appointment, some of the creditors applied to the district court to call a meeting of the creditors to fill the vacancy, which it was alleged his failure had created. The syndics filed opposition to this, and the court, after argument, having rendered a decree that a meeting should take place for this purpose, they appealed.

We are of opinion the court did not err, and

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that the creditors of an insolvent have a right to change syndics, who are but their mandataries, in case they make a cession of their goods. *ipso jure se entiende ser revocado, quando despues de dado el mandatario se hace de deterior o peor condicion.—Curia Phil. lib.* 2. *chap.* 11, *no.* 43, *Fallidos.*

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Hoffman for the plaintiff, *Seghers* for the defendants.

BROCARD vs. *CAMP'S CURATOR.*

A party to a sale, cannot prove its simulation by *parole.*

APPEAL from the court of the parish and city of New Orleans.

MARTIN, J. delivered the opinion of the court. This cause is before us on a bill of exceptions to the opinion of the court of probates, on the rejection of parol proof that the sale of a lot, made by the plaintiff for the deceased, was a simulated one, and that the latter promised to re-convey the lot.

The case has been submitted to us without argument.

We think the judge of probates did not err. The plaintiff ought to have armed herself with a counter-letter.—*Ante*, 451.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be affirmed with costs.

Maybin for the plaintiff, *Hennen* for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

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Aug. 1823.

BABINEAU
vs.
CORMIER.

If parol evidence, in regard to immoveable property, be admitted without objection in the inferior court, it cannot be objected to on the appeal. If there be error on the part of the vendor in delivering the property and error on the part of the vendee, in taking possession the latter cannot hold by prescription.

WESTERN DISTRICT, AUGUST TERM, 1823.

BABINEAU vs. *CORMIER.*

APPEAL from the court of the seventh district.

PORTER, J. delivered the opinion of the court. The dispute between the parties in this action, has grown out of a purchase, made by the defendant, from one of the co-heirs of the plaintiff, of a tract of land of three and a half arpents front, on the bayou Carancro, with the depth of forty-two, it being a part of a tract of ten arpents front, with the depth already mentioned, originally conceded to Ann Guilbeaux, mother to the plaintiff.

The grant from the government is in the usual form, and issued upon a survey made by the commandant of Attakapas. Several years after the date of this concession, eight of the neighboring inhabitants, who had also titles for ten arpents front, adjoining it, called in one Gonsoulin, a surveyor, to survey their respective tracts. By this operation it was ascertained there was not a sufficient quantity to satisfy all the titles, and in consequence the several grantees, agreed to lose proportionally. In designating the limits of the title, under which the present parties claim, the first line was run ten arpents in a diagonal course, which made the quantity fall short by two thirds of an arpent, of what the grant would have embraced, had the line been run at right angles from the point of departure.

About one year after this arrangement, the defendant purchased three and a half arpents of land, front, part of this concession, from one of the heirs of the grantee. In the conveyance the property is described as, *une terre de trois arpents et demi de face avec quarante deux de profondeur, sur chaque bord du bayou Carancro limite par en bas par la veuve Frederic le Blanc, et par en haut par Joseph*

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Babineau—"A tract of land, of three arpents and a half in front, with fifty two in depth, upon each bank of the bayou Carancro, bounded below by the widow le Blanc, and above by Joseph Babineau." The principal point in dispute, is how the land thus conveyed should be located: the plaintiff insists the defendant ought to take the front, in pursuance to the survey made by Gonsoulin, while, on the part of the defendant, it is contended, that he purchased three and a half arpents of land in front, without reference to any particular survey, and without mention being made in the act of sale, of any circumstance, which would qualify, or restrict his right, to demand the whole quantity mentioned in it.

It is unnecessary for us to examine whether parol evidence can legally be received in any case, to shew that by reason of a previous survey, or other circumstance, a greater or less quantity of land than that mentioned in the deed of conveyance was sold; or more especially, whether it can be received in a case such as the present, where the actual possession given, was in conformity with the title, and in opposition to the boundaries indicated on the plat of survey. The testimony, by which the expressions used

in the deed to the defendant are limited, was given in the court below, without any exception to its introduction, and we feel bound to notice it. In the case of *Clark's ex's.* vs. *Farrar*—3 *Martin*, 252, 253, the court held that the objection to illegal testimony was not waved by a failure to except to it on the trial. We have had frequent occasion since, to consider the principle which that decision recognizes, and once to express an opinion respecting it. We are satisfied it is unsound. The rule is correctly given in the case of *Highlander* vs. *Fluke*, 5 *Martin*, 442. Parties have certainly a right to acknowledge a parol contract for land; and they have a right to consent, that their stipulation in regard to it, may be proved by oral evidence. Nor is it seen how a regard to the interests of third parties require the rejection of such proof. They certainly cannot be affected by it, for what is done in the suit where such testimony is admitted, is to them *res inter alios acta.*

Proceeding, therefore, to examine the evidence, we find it proved by one witness, that the defendant went into possession under an express stipulation, that he was to hold the land, in conformity with the survey of Gonsou-

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lin; and by another, that he had always acknowledged that survey until a few years back. Taking this testimony as true, and we have been unable to find any thing in the record to authorise us to reject it, the defendant is bound by his agreement. He must hold as he bought; and his intention at the time he made the purchase, must govern his rights under it.

He contends, however, that admitting he purchased under this survey, he has acquired a title to the premises by prescription. The evidence on this head is, that the plaintiff put the defendant in the possession of the premises he now claims, and that he remained in actual possession of them for ten years. The witness who relates the manner this possession was given, states that the plaintiff shewed, where *he thought* the line would run, but they did not measure it, nor was any division made. That the witness himself stepped off the distance of three and a half arpents. Taking the purchase to have been made according to the survey already mentioned, it is evident the possession delivered was erroneous, for the spot indicated as the boundary, was nearly that, where the front line would have terminated,

running it at right angles. The manner the quantity was ascertained, readily accounts for the mistake, and the witness declares that, the plaintiff did not positively shew the limit, as that which would divide his land from that of the defendant.

Under these circumstances of error on the part of the vendor in delivering property not sold, and error on the part of the vendee, in taking possession of that which he did not purchase, the question is, can the latter hold it by prescription. We think not. An important and indispensable requisite is wanting to make out a title of the kind; the intention to possess. The vendee intended to enter into, and hold the property sold him. What he possessed over and beyond the quantity purchased, was in error. Pothier gives as an illustration of this doctrine, the very case now before us. If, says he, *J'ai achete de vous une chose, et vous m'en livriez une autre que je prends par erreur pour celle que j'ai achetée, et dont j'ai intention d'acquérir la possession; je n'acquiers la possession ni de celle que j'ai recue par erreur, parce que ce n'est pas celle dont j'ai la volonte d'acquerir la possession, ni de celle que j'ai la volonte d'acquerir, parce que*

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je ne l'ai pas reçue.—Pothier traite de la possession, chap. 4, no 40—See, also, Digest, lib. 41, tit. 2, no. 34.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Fennessey for plaintiff, *Brownson* for defendant.

FRERE & AL. vs. FRERE & AL.

An inventory made in the absence of the under-tutor, is incorrectly made.

An estimation of property in a marriage contract, previous to the passage of the civil code, operated as a sale.

APPEAL from the court of the seventh district.

MARTIN J. delivered the opinion of the court. The plaintiffs seek to avoid the inventory and settlement made by the parish judge of the estate of their mother, because their under-tutor was not present at the inventory, and, because the property which she brought in marriage was not divided among them in kind, but was considered as having been vested in her husband.

On the first point there is not any doubt that the law requires the presence of the under-tutor at the inventory. In this part of the proceedings the interest of the minors are diametrically opposed to that of the tutor. The in-

ventory is to charge the latter, and to be evidence of the nature and value of every article, which constitutes the entire part of the estate with which he is chargeable. He, therefore, has an interest to diminish the number and value of the different articles for which he has to be accountable to the minors: they have an interest that nothing be therein omitted, and that every article be placed therein at its real value. But the necessity of the presence of the under-tutor, does not result merely from the idea that may be entertained, of the interests of the tutor and minors. The law expressly demands his presence at the inventory—*Civil code*, 68, *art.* 54.

The marriage contract, in this case, took place before the passage of the civil code. Its effect and construction, is therefore to be sought in the Spanish law.

The alienation of the property brought in, is presumed to have been intended, in case of doubt, with the view of vesting the property in the husband—6 *Martin*, 659, *Jordan* vs. *Williams & al.*

But, on examining the contract, it does not appear to us that the intention of the parties is doubtful.

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The different articles of property are valued severally; their amount is added, and is stated to be 12174 dollars, and this sum is stated to constitute the rights and claim of the future wife. It is this sum, then, for which the husband, at the dissolution of the marriage, is to account.

But it is urged that there is a proviso, by which, on the death of the wife, *without issue from the marriage*, her heirs were to receive the dotal property in kind, except such part of it as the husband might have sold, which was to be accounted for at the price of the estimation.

Hence it was contended that, on her death with issue from the marriage, the same consequence was to follow. This cannot be, *expressio unius est exclusio alterius* It is clear, from the expressions of the will, that a sale of part, nay of the whole of the dotal estate was contemplated, hence provision was made for the case of its happening.

We conclude that the inventory was incorrectly done, in the absence of the under-tutor, but that there was no error in allowing the plaintiffs their portion of the dotal estate, according to its valuation.

It is urged that the presence of the under-tutor, at the settlement, does not sufficiently appear from the proceedings, which mention it, and that it ought to appear from his signature.

As the proceedings must be set aside, on account of his absence from the inventory, it is useless to examine this last objection.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the inventory and proceedings be avoided and set aside, and the judge of probate be directed to proceed according to law; the costs of both courts to be borne by the defendants and appellees.

Simon for plaintiffs, *Robin* for defendant.

NOTE.—Porter J. did not join in this opinion, having been consulted on the case, while at the bar.

PARQUIN & AL. vs. *FINCH.*

A clause in a marriage contract by which the whole o the acquests & gains is to go to the survivor, in case there are no children, is not illegal.

An exception may be taken to the opinion of the judge, on a

APPEAL from the court of the seventh district.

MATTHEWS,* J. delivered the opinion of the court. This action was instituted by the heirs of Mrs. Finch, against the defendant her

*Porter, J. did not join in this opinion, having been of counsel in the cause.

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question of law growing out of the merits, if given, on sending the cause before referees.

last husband, to recover the amount of her estate remaining in his possession, at, and after her death. There is a marriage contract executed between Finch and his late wife, in which, amongst other things, it is stipulated and agreed if they should have no children, that, then, in such case, the survivor should have and hold in full property, the whole amount of acquests and gains, which might belong to the community at the death of either party. The defendant claims the benefit of this clause of the contract as survivor, without children having been produced by the marriage. There were long and intricate accounts to be settled between the parties, which were referred by the district court for liquidation: but previous to, or on the order of reference, the judge expressed an opinion that the above stipulation in the marriage contract was illegal and void. In conformity with this opinion, the referees adjusted and settled the accounts of the parties, and made their return accordingly; on which final judgment was rendered, from which the defendant appealed.

The case comes up without statement of facts, special verdict, or any thing which shews (as required by law) that the whole evi-

dence is before us, on which the cause was decided: and on this ground the counsel for the appellee moves to dismiss the appeal; which, if nothing more appeared on the record, ought perhaps, to be done. But we find a bill of exceptions to the opinion of the judge *a quo*, by which he declared null and void the stipulation in the marriage contract, above cited. This, the plaintiff insists, is an exception to a final judgment, which the court has repeatedly decided, cannot be taken with effect. It is clear in the present case, that no final judgment was rendered until the return of the referees, whose business it was to examine the facts of the case, under instructions of the judge, in relation to points of law. Any opinion given on such points, before final judgment we think, a fair and legitimate subject for a bill of exceptions, that may be regularly taken at any time, during the trial of the cause. In this case it is clearly shewn by the bill itself that the exception was taken during the trial. We are of opinion that the district court erred in declaring void that part of the marriage contract which grants to the husband the whole of the community on the contingencies of having no children by the marriage and surviving his wife.

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It is therefore, ordered, adjudged and decreed, that, the judgment of the district court, be avoided, annulled and reversed; and that the case be remanded for a new trial, with instructions to the judge *a quo*, to consider as legal and valid that part of the marriage contract, above referred to, containing the provision in favor of the appellant as surviving partner of the community of acquests and gains; and that the appellees pay costs.

Brownson for plaintiff, *Baker* for defendant.

THOMPSON vs. *W. & H. MILBURN.*

Redhibitory defects in a slave may be pleaded after twelve months in defence of an action brought for the price.

Any disease of which a slave is afflicted at the time of sale which has progressed so far as to be incurable, may be pleaded as a redhibitory vice.

If the slave

APPEAL from the court of the seventh district.

PORTER, J. delivered the opinion of the court. The petitioners sue to obtain the price of a slave. The defendants resist the demand on an allegation that the negro was unsound, and afflicted with redhibitory diseases, incurable in their nature, at the time they purchased him; of which diseases he died.

The sale took place in the month of August,

1819, and this action was commenced the first of November, 1820. The plaintiff contends that the defendants cannot avail themselves of the defence set up, as twelve months have elapsed from the time of the purchase.

die, the burthen of proof that the disease was curable, is cast on the seller.

The article of our code, which directs that the action of redhibition must be brought in one year at farthest from the date of the sale, can only receive an application in cases where the vendee is plaintiff, and *brings an actum*. It leaves untouched the right to offer the want of consideration as a defence against paying the price agreed on. The rule is, "*Lo que tiene tiempo limitado para demandarse in juicio, es perpetuo para exceptionarse.*"—*Febrero, p. 2, lib. 3, cap. 1, sec. 6, no. 250.*

This point disposed of, our attention is next carried to the merits of the controversy. The cause comes up on a statement of facts, but as we observe the judge *a quo* directed two questions to be submitted to a jury, we shall notice the finding on these questions, after stating what facts are established by the evidence.

Two gentlemen of the faculty, who were called on a consultation on the negro, five weeks after the sale, and a short time previous to his death; state that they found him laboring under

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a chronic dysentery of long standing; a disease, which though it may sometimes be cured by proper regimen, generally terminates in death. Three other witnesses state that, the negro was unwell immediately after the purchase. One called by the plaintiff, declared that, the negro had been afflicted with a diarrhea, some time previous to the period when the defendant purchased him; that the physician who attended him had reported him well, and that he had quite a healthy appearance when sold.

That section of the civil code which treats of the defects in the thing sold, and of redhibitory vices, is by no means the most clear and satisfactory of that work, and since its enactment several embarrassing questions, arising out of its provisions, have been presented for decision. It is now, however, the settled doctrine in this court, that, by the term, "disease incurable in its nature," must be understood any disease of which the slave is afflicted at the time of the sale, that has progressed so far as to be incurable. Our only enquiry, then, is, do the facts, as proved in evidence, bring this case within the rule?

The testimony already detailed, appears to

us to show beyond doubt, that the negro was diseased on the day of the sale. The evidence of the physicians satisfies us that it was of that disease he died. Whether it had progressed so far as to be rendered incurable is the main, and, indeed, the only difficulty which the case presents. The fact is not placed beyond all doubt by the testimony, nor can human testimony ever establish beyond doubt, at what period a disease is incurable, unless the persons who give it are acquainted with all the means of cure which human knowledge possesses. We, however, have it in evidence here that the slave sunk under the disease, and it is such as is generally incurable. This we think sufficient to throw the burthen of proof on the other side, and the defendant aware that it did, has labored to shew that, the fact of the disease being curable, clearly resulted from the testimony.

But, in this he has completely failed. The evidence so far from establishing the curableness of the disease, is entirely silent in regard to it. To supply the place of proof, the defendant has resorted to conjecture, and has contended, that we do not know, but that if a physician had been called in earlier, the life of the

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slave might have been saved. We do not know what effect an earlier application to medical aid might have had, and for that very reason we cannot give the plaintiff the benefit of a fact which he has never proved. In the case of *St. Rome* vs. *Poré*, the same argument was resorted to, and was considered of no weight .The court there held, that it lay on the vendor to shew that, the disease of which the slave died, might, under a different course of treatment, have been cured—10 *Martin*, 215. Every thing in this case rebuts the presumption that the disease would have yielded to medicine, nor do we see that there was such negligence on the part of the vendee as to deprive him of what we conceive a just and conscientious defence. As was said in the case just cited, physicians are frequently not resorted to until family medicines fail. The right of purchasers to resist the payment of an object which turns out to be of no value, should not be made to depend on their medical skill; on their knowledge that a disease on its first appearance is a dangerous one; and that recourse must be instantly had to professional men. That of which the slave died we know to be

one that is slow in its progress, and not apt in its incipient stages to excite much alarm.

The jury have found that the negro was at the time of sale, afflicted with an *acute* dysentery. We see nothing in the evidence to support the conclusion. Taking it to be correct, it would not affect the decision of the case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

—— for the plaintiff, —— for the defendants.

ROMAN'S HEIRS vs. *SMITH & AL.*

An extract from the books in which grants were recorded, cannot be given in evidence, until the absence of the grant be satisfactorily accounted for

APPEAL from the court of the seventh district.

MARTIN, J. delivered the opinion of the court. This case is before us on a bill of exceptions to the opinion of the judge *a quo*, in rejecting an extract of a book, entitled *Primeros aecretos de concesiones*, left by the officers of Spain, at the change of government, as the evidence of a grant from the king, under which they claim.

*Porter, J. took no part in this case, having been of counsel for the plaintiff.

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The king's lands were granted by the governor or intendant, whose assent to the application for land was evidenced by an order, *decreto*, made on the margin, or at the foot of the petition; or finally by a formal grant. The decreto had the signature, and the grant the signature and seal, of the officer granting and the counter-signature of a secretary.

The decreto or grant was always delivered to the applicant, as the evidence of his right. The extract appears to be a record of the name of the grantee, the quantity of land granted and its situation. Whether this record was made from a decreto or grant, and we are ignorant of any other mode by which vacant lands were granted, it is evidence, the admission of which, was not to be permitted to the grantee or his heir, who had once received from the government a decreto or grant, (under the hand or hand and seal of the officer authorised to grant,) entitled to more credit than the record or extract of it, made by a clerk.

We, therefore, cannot say that the district judge did err, in insisting, before he admitted the extract in evidence, that the plaintiffs should shew that the original was not in their possession.

But we are of opinion that, the judgment ought to have been as in the case of a nonsuit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment, as in the case of a nonsuit.

Brownson for the plaintiff, *Lessussier* for the defendant.

GUIDRY vs. *GREEN.*

The purchaser of a tract of land of 1400 arpents, cannot refuse payment on the ground that the United States have only confirmed the title to 640.

APPEAL from the court of the fifth district.

MATTHEWS,* J. delivered the opinion of the court. In this case the plaintiff prayed an injunction, to stay proceedings on a judgment, which he says was illegally obtained against him by the defendant, and which she was about to cause to be unjustly executed. The injunction was granted, and subsequently the cause heard on its merits, wherein the court below gave judgment, from which the plaintiff appealed.

A bill of exceptions was taken to the opinion of the judge *a quo*, by which, in the course of the tri-

*Porter, J. did not join in the opinion, having an interest in the cause.

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al, her ejected parol evidence against the return of the sheriff, on the citation in the former suit, wherein Mrs. Green was plaintiff: and, as the whole cause of dispute between the parties, is now before this court, on full evidence, it is deemed unnecessary to decide on this bill of exceptions.

From the facts and arguments of counsel in the case, it appears clear that the whole ground of contention consists, in the legality and justice of compelling the plaintiff to pay the full amount of price for which a certain tract of land was adjudged to him, at the probate sale of the estate of Elisha Green, the husband of the appellee; as containing 1400 arpens, when, as it appears that, the United States have confirmed the claim and title to said land, only to the extent of 640 acres.

There is an apparent contradiction between cases, heretofore decided in this court, on account of the troubles, or deficiency in title, which authorise purchasers to withhold payment of the price of real property. In the first of those decisions an opinion was entertained that, real danger of disturbance by eviction, in consequence of a better title being in some other person than the seller, and shewn to the

court, or presenting an unsettled mortgage on the property sold, were sufficient to authorise a purchaser to withhold payment until security should be given against those dangers. The doctrine to be drawn from these decisions has been somewhat impaired or altered by an opinion, expressed in the case of *Fulton's heirs* vs. *Griswold*. Vide 3 *Martin*, 236–246, 5 *Martin*, 625, & 7 *Martin*, 223.

Whether these decisions be or be not absolutely contradictory and irreconcilable, and consequently, which ought to prevail as being best supported by law and equity, nothing requires us to determine. The appellant does not shew title to the tract of land, which he purchased as above stated, in any other person than those for whom it was sold. The claim is for 1400 arpens, and the confirmation of title to 640 acres, is no proof of the want or defect of title to the balance. There is no *questio mota*, no suit brought for any part of the premises purchased; no evidence of the existence of any title which conflicts with that of Green's succesion, or any species of incumbrance on the land.

It is therefore ordered, adjudged and de-

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creed, that the judgment of the district court be affirmed with costs.

Simon for the plaintiff, *Brownson* for the defendant.

THIBODEAU vs. *PATIN.*

The surety who is bound in *solido* cannot claim the benefit of discussion.

APPEAL from the court of the seventh district.

PORTER, J delivered the opinion of the court. The defendant is sued on an obligation in the following words:

"Twenty days after date, we, or either of us, promise to pay to the order of John Olivier Thibodeau, three hundred dollars, value received, the 15th Nov. 1820.

Rezin Bowie,
Marcel Patin, Surety."

The answer sets up, for defence to the action, a plea that the surety was not bound in *solido*, and that he cannot be sued until the property of Bowie, the principal debtor, is discussed; it concludes by indicating property by which that discussion can be carried into effect.

Judgment was given in the court below, in

favor of the plaintiff and the defendant appealed.

It appears to us no error was committed, and that the defendant is not entitled to the benefit of the plea, on which he relies. "The *surety* is not obliged to pay unless the debtor fails to satisfy the debt, and the property of the principal must be discussed, unless the plea of discussion is renounced, *or the surety be bound in solido with the debtor;* in which case the effects of his engagement, are to be regulated by the same principles established in relation to debtors *in solido.*"—*Civil Code*, 428, *art.* 7.

Supposing it possible to escape from this positive and explicit declaration of law, the defendant has not brought himself within the rule, which enables sureties bound in the ordinary way, to refer their creditor to the principal debtor for payment; he makes no tender of money to carry the discussion into effect—*Civil code*, 430, *art.* 9; *Baldwin* vs. *Gordon & al.* 12 *Martin*, 382.

It appears evident to the court, that the defendant, under pretence of correcting an error of the inferior tribunal, has sought to delay the execution of a judgment, the correctness of which cannot be doubted.

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It is, therefore, ordered, adjudged and decreed, that that judgment be affirmed with costs, and ten per centum damages for the delay.

Simon for the plaintiff, *Fennessy* for the defendant.

BERNARD vs. *SHAW.*

When the claimant does not shew his right to any determined spot, it cannot be enforced.

APPEAL from the court of the seventh district.

MARTIN,* J. delivered the opinion of the court. The plaintiff complains that the defendant prevented the sheriff from putting him in possession of a tract of land, which he recovered in this court, at September term, 1820; 9 *Martin*, 49. The defendant claimed the possession of the whole, and alleged a good title. There was judgment against him and he appealed.

The facts proved established the plaintiff's right of possession to the whole; the defendant, however, gives in evidence, his possession and cultivation of a field of fifteen arpens; but

*Porter, J. did not join in the opinion, having been of counsel in the cause.

neither in the pleadings nor in the evidence do we find the means of ascertaining the particular spot on which this possession was exercised. He produced no title; he claimed the whole and did not enable the plaintiff to come prepared to contest his claim upon any determinate part, and nothing in the evidenec enabled the distri t court to allow his claim to such determinate part. We conclude, the district judge did not err, in disregarding his pretensions; and the case is not such that justice requires we should remand.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Simon for the plaintiff, *Brownson* for the defendant.

BOISSIER'S SYNDICS vs. *BELAIR & AL.*

APPEAL from the court of the fifth district.

A bona fide creditor of an insolvent, may, when sued by the syndics, plead in compensation, a debt due him previous to the insolvency But he must

MATTHEWS,* J. delivered the opinion of the court. In this case, the syndics sue together

*Porter, J. did not join in this opinion, having an interest in the insolvent's estate.

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with the representatives of the wife of the insolvent, to recover a sum, claimed from the defendants, as principal and surety on account of a purchase made by the former of a tract of land, sold as belonging to the community of acquests and gains of said Boissier and his wife, for the price of 1060 dollars, payable in three equal annual instalments, and on the first three of which becoming due, this suit was instituted.

prove the period when he became creditor, by other evidence than that of the insolvent.

In the answer, compensation is pleaded on the part of Belair, by attempting to set off a note of hand against the plaintiff's claim, executed by Boissier to another person, and by him transferred by endorsement to said defendant; and also, the benefit of a judgment which Bijeau expected to obtain on a note of said Boissier, which the latter had failed to pay in bank, the former being subrogated, on paying the same to the agents of said bank, and on which he had commenced suit; by assignment to the principal defendant in the present action. Judgment was rendered for the defendants, from which the plaintiffs appealed.

In the course of the trial in the court below, when the instruments of writing were offered in evidence by the appellees, to support their

plea of compensation; the plaintiffs' attorney objected to their admission, unless they were supported by proof of the real time at which the transfer was made, in order to establish the fact of said alienation having taken place, previous to the failure of the insolvent. Being over ruled in their motion, requiring additional evidence, by the court, they took an exception to its opinion, which comes up with the record; and must be first considered. It is believed that a bona fide creditor of an insolvent, when there are mutual debts existing between the parties at the time, and previous to such insolvency, may plead his claim in compensation to any suit brought by the syndics of the insolvent. In the ordinary trading and commerce between men, when no suspicion is raised, by a failure of either of the parties, an endorsement made in blank, or to which a date is affixed will be considered as regularly done, and require no other proof to aid its validity.

But in a concurso, the creditors are considered as litigating with each other, and are bound to establish their claims against the insolvent by other and less suspicious testimony, than that which arises from his acknowledgments, or from instruments under private signatures,

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which can be anti-dated with so much facility. See *Febr. p.* 2, *b.* 3, *ch* 3, *no.* 33. Immediately previous to failure, in *tempo inabil*, and much more so after failure, no alteration can be made in the situation of the creditors of an insolvent, so as to give any one or more of them an advantage over the rest; this might be effected if his debtors were permitted to acquire claims against him, and plead them in compensation.

Of this the defendant, in the present case, seems to have been well convinced, for the transfers bear date prior to the cession of goods by Boissier; but as they may have been anti-dated, and as in cases of failure fraud is properly presumed; there can be no doubt of the propriety of compelling the appellees to support the claim of compensation, by proof of the actual time at which the debts, on which they rely, were transferred.

There is a circumstance peculiar to this case, as appears by the evidence. One of the transferrors, by his attorney in fact, W. L. Brent, offered to prove himself a creditor of the insolvent to a large amount, some time after the date of the transfer to his co defendant. It is possible that this latter claim may have been

on account of some other dealing between him and the insolvent. If it be for the same claim, it amounts to a proof of its illegality, admitting the alienation of it to have taken place at the time purported by the date of the transfer. If it were a good and bona fide claim against the estate of Boissier, at the time it was offered, then the transfer must have been anti-dated. It is enough to raise suspicion in this case, independent of the general principles of law, which require the date to be fixed by proof, independent of the writing itself. We are clearly o opinion that the judge *a quo* erred in refusing to require the proof, insisted on by the appellant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered and decreed, that the cause be remanded to the court below, with instructions to the judge thereof, not to admit the claims pleaded in compensation, unless they be proven to be bona fide and to have been transferred in proper time, by evidence other than that which appears in the transfer itself.

Baker for the plaintiffs, *Brownson* for the defendants.

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vs.
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LABARTHE vs. *GERBEAU.*

APPEAL from the court of the fifth district.

The subscribing witness to an instrument must be produced or his absence accounted for.

PORTER, J. delivered the opinion of the court. This action was commenced on a promissory note. The defendant pleaded the general issue. On the trial the plaintiff offered, as a witness, to prove the execution of the obligation sued on, the parish judge of St. Mary's, who had certified on it the consideration for which it was given. The defendant objected to his testimony, on the ground, that there was a subscribing witness to the note, who should be produced or his absence accounted for. The judge admitted the evidence offered, and the correctness of his decision is brought before us, by a bill of exceptions.

We think he erred. There is no rule better established than that, which requires, that the witness who subscribes an instrument of writing, should be resorted to, in the first instance to prove it; and that other testimony cannot be heard until his non production is accounted for.—*Phillips on ev.* 412. Many plausible reasons have been given to induce us to conclude that the testimony of the parish judge should

be considered as satisfactory, as that of the person who signed as a witness. These reasons if adopted by us would destroy the rule entirely, or at least introduce so many exceptions to it that it would rarely have any effect. It is founded, however, on the soundest principles, and it must govern this case. The subscribing witnesses must be presumed to have had a knowledge of the circumstances of the transaction, not possessed by other persons. He was selected by the parties to be the witness of the contract sued on, and on every consideration, his evidence was the best of which the case was susceptible.

The opinion we entertain on this point, renders it unnecessary to express any on that made by the counsel for the appellant, as to the illegality of serving notice on him to take testimony, when his client was not absent from the state.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that the case be remanded for a new trial; and that the appellee pay the costs of the appeal.

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LABARTHE *vs.* GERBEAU.

Simon for the plaintiff, *Fennessy* for the defendant.

FRUGE & AL. vs. *LA CASE & AL.*

Although three witnesses only could be had, at the house in which, and at the instant when, the will was executed, if a fourth might have been obtained by going or sending to another house not very distant, & no necessity existed for the immediate execution of the will, the requisites of the code are not complied with, and the will is not duly executed.

APPEAL from the court of the fifth district.

MARTIN,* J. delivered the opinion of the court. The plaintiffs claim the estate of the late Perrine Malvaux, as her legal heirs, in the possession of the defendants. These pleaded the general issue, expressly denying the heirship of the plaintiffs; that Perrine Malvaux made a will by which she bequeathed all her property to the defendants. Further, that they are creditors of the estate to the amount of 4000 dollars, for board, washing and lodgings, &c during the ten years preceding her death; for which they pray judgment, if the will be disallowed and the plaintiffs declared heirs.

There was judgment for the defendants and the plaintiffs appealed.

The statement of facts shewed, that the

*Porter, J. did not join in this opinion, having been of counsel for the defendants.

plaintiffs are heirs, as they stated themselves to be, and the possession of the defendants of part of the estate.

The defendants produced a paper, purporting to be the will of the deceased, brought into court by the parish judge, who deposed that it had been partially, but not wholly, proved, and that the execution of it had not yet been ordered.

Lavergne deposed that the will was made at L. Dupre's in the country, where three witnesses only could be procured; that, after the will was made, he folded up the paper on which he had written it and handed it to the testatrix, who went with him and the other two subscribing witnesses, to Debaillon's store, where they procured the signatures of four other witnesses, on the envelope. The will had been made and attested by three subscribing witnesses at Dupre's. Before signing, he read it audibly, and after the testatrix had well heard and understood it, she presented it to him, and L. & J. Dupre, declaring it to be her will. After seeing the testatrix sign, the three witnesses subscribed, and he, by her order delivered it to her; and without turning aside for any thing, they went to Debaillon's, where she

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presented the will, enclosed in a sealed envelope, to the seven witnesses, whose signatures are on the envelope, and declared it to be her will, and he saw her and the seven witnesses subscribe, on the envelope. He and L Dupre lived at the house where the will was made, and the other witnesses about a league off.

L. & J. Dupre, the two subscribing witnesses to the will, corroborate the testimony of Lavergne.

The proof of the will was taken in the district court, by consent of the parties. The plaintiffs reserving all exceptions, except as to the time and place, and the want of the order of the parish judge that the will be executed.

It is true three witnesses suffice to a nuncupative will, under private signature, made in the country, when a greater number cannot be procured. Five is the legal number required, if possible.

In the present case, Lavergne swears that not more than three could be procured at Dupre's, when the will was made; the two other witnesses assert it, and the district judge, it seems, has taken this for granted.

Notwithstanding the inclination of every member of this tribunal to respect the decision

of inferior judges, in matters of fact, we are unable to adopt the conclusion of the judge *a quo* in this case.

The testimony shews that it would have been not only possible, but extremely easy and convenient, to have procured the five witnesses whom the law requires, if the parties had been apprised of the imperious necessity of procuring them.

We believe, because three witnesses depose, that at the time the will was signed, there were only the three witnesses, who subscribed it, in the house; but it is also sworn that there were four others residing within a league, and that a fifth, [Debaillon] was to be had by calling on him, and that he lived at no inconvenient distance, since the testatrix and the three subscribing witnesses, found it convenient, immediately, *without turning aside to any thing else*, to go there, in order to comply with certain formalities, which, we presume, were thought necessary to the completion of the will.

It is clear from the testimony, that there were only three witnesses to be had at Dupre's when the will was made.

But the law, being satisfied with that number, only in case a greater number *cannot* be

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procured, required a resort to the means by which witnesses can be procured: *i. e.* by sending for the required number, when this is possible, or at least not very inconvenient.

Four witnesses are sworn to reside within a league of Dupre's; the distance to Debaillon's, a fifth, is not stated; but as the testatrix and the three subscribing witnesses went thither immediately after the will was signed, it requires much credulity to yield assent to the proposition, that it was either impossible, or at least vastly inconvenient for the same persons to have gone there, before the will was made. It is clear that it was believed, if not certainly known, that by so doing, Debaillon's presence might have been obtained as a fourth witness; and so a greater number than three procured.

But it is urged that the four additional witnesses, whose signatures are on the envelope, may be reckoned as subscribers of the will.

It seems apparent, that the testatrix or her advisers, thought that Debaillon, being a justice of the peace, a mystic will might be made before him and four witnesses, as if he had been a notary.

Admitting that the witnesses, who subscribe on the envelope of an intended mystic will,

without the intervention of a notary, are to be considered as subscribers to the enclosed will, there would not be any necessity of the intervention of this officer in a mystic will; for then the will would necessarily be supported, as a nuncupative will under private signature. And when the will is ordered to be executed, it is of no kind of importance whether it be so as a mystic will, or otherwise. The distinction, between the different kinds of wills, is of no consequence, except in order to regulate the probate.

We are of opinion that the conclusion to which the witnesses have come, that no more than three witnesses could be obtained at Dupre's, where the will was made, cannot be binding on us, so as to authorise us to act on it, as establishing the impossibility, of obtaining more than three witnesses, on which that number is made to suffice.

We conclude that the plaintiffs have made out their case, and that the district judge ought to have decreed the delivery to them, of the part of the estate proven to be in the hands of the defendants.

But the latter have re-convened the former and required that judgment might be given for

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the sum which they claim, as creditor, of the estate.

The plaintiffs deny the right of the defendants to the reconvention.

As the conclusion to which the district judge came, on the plaintiffs' claim, rendered his examining the right of the defendants to reconvene the plaintiffs, and the legitimacy and amount of the demand, unnecessary; as in case of a re-convention, one judgment ought to put an end to the claims of both parties, and as the testimony, on this part of the case, does not appear perfectly satisfactory to us, we deem it best to remand the cause for a new trial, without expressing any opinion on the right of the defendants to re-convene the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case be remanded for a new trial, and that the costs of this appeal be paid by the defendants and appellees.

Brownson & Lessussier for the plaintiffs, *Simon* for the defendants.

LEWIS vs. *BOISSIER'S SYNDICS.*

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When there exist mortgages on the property ceded by the insolvent, it must be sold by the syndics for cash.

APPEAL from the court of the seventh district.

MATTHEWS,* J. delivered the opinion of the court. This case comes up on an appeal from an order or decree of the court below, by which the defendants, (here appellants,) were required to sell for cash a certain part of the insolvent's property, on which the appellee held a mortgage. The legality and correctness of this decree is objected to, not so much on account of want of right and power in a mortgage creditor to insist on the immediate sale of the mortgaged property, in case of the insolvency of the mortgagor; as the manner of proceeding in such sale. They agree that it should be effected, in the mode prescribed by law under an execution. But we are of opinion that the disposal by sale of the estate ceded by an insolvent, under authority of his creditors, differs entirely from sales made by executions, or orders of seizure; and that in the former, the right of a mortgage creditor, to cause the mortgaged property to be sold, or so

*Porter, J. did not join in this opinion, being one of the creditors of the insolvent.

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much thereof, as will be sufficient to make the amount due to him, with interest and costs, cannot be questioned, without embarrassment by appraisement, and the necessity of selling said property for two thirds of its value, &c. We, therefore, conclude that the decree of the district court is correct.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Brownson for the plaintiff, *Baker* for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM, 1823.

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LANDREAU
vs.
ROCHELLE & AL.

LANDREAU vs. *ROCHELLE & AL.*

A debtor cannot avail himself of a payment made contrary to the consent of the creditor, on the pretence that the person he owed, was agent of him to whom the payment was made.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court.

This action has commenced by an injunction staying the defendant from further proceedings under an execution. The facts on which we are called to prononnce a judgment, are so numerous, and some of the transactions so obscure and equivocal, that we find it necessary to state them at length.

The defendants in this case are the agents of Martineaux & son, and the claim which they prosecuted by an application for an order of

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seizure and sale, is due to those persons. The plaintiff avers, that he has paid them at several times, and in various ways. The most regular way of conducting the enquiry, will be to see for what amount the plaintiff was indebted to the principals, Martineaux & Son.

Before stating the agreement, which the parties entered into, and which forms the basis of all the subsequent transactions, it is proper to observe that the plaintiff arrived in this country from France, some time previous to the month of June, 1817, charged with a power of attorney from his mother, to act for her, in relation to the estate of his brother, who had been a partner of the commercial firm of Martineaux & Landreau. In the month of July, 1817, the plaintiff entered into articles of partnership with Louis Martineaux and Charles Martineaux, in which it was stipulated that, in order to simplify the accounts existing between them, and to prevent unnecessary delays in the collection of the claims of the late firm of Martineaux & Landreau, they had agreed—the former, as attorney in fact of his mother, the *recognized heir*, as she is called in the instrument—the latter, in their own right, that all property was to be held for

common benefit, and to be in partnership for two years.

Before the expiration of these two years, to wit: on the 8th day of April, then next following, the parties entered into another contract, which it is necessary to set forth particularly.

This contract states that, Charles Martineaux for himself, and as attorney in fact for his father, John Charles Louis Martineaux, had sold, (with some exceptions,) to the plaintiff, all their interest in the property belonging to the partnership, which they had entered into the preceding year. In consideration of which he, the plaintiff, promised to pay, first, all the debts due by the firm, amounting to the sum of eleven thousand six hundred and fifty dollars; second, to pay to the vendors the sum of twenty-one thousand dollars, that is to say, on the 31st of December, 1819, the sum of $5000; on the 31st of December, 1820, $12000; on the 31st December, 1821, $4000.

The property, in France, belonging to the firm, was excepted from the sale, and it was stipulated that after deducting expenses and charges, it was to be divided into three equal portions, and that Landreau's portion should be applied by Martineaux & son, to the

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payment of so much of the amount of the notes, which the plaintiff had given in payment, of the property purchased by him.

It was, also, further stipulated, that the debts due to the firm, amounting to the sum of 8350 dollars, should be excluded from the sale, and that they were to be collected at joint expense, and distributed according to the shares which the respective parties had in them. That should the debts due *by* the firm amount to more than the estimate made by them, then the overplus should be paid, one third by each of the parties to the act, and that if it turned out they were less, the plaintiff should pay two thirds of the deficit, to J. C. L. Martineaux and Charles Martineaux. This part of the agreement was afterwards modified, so as to make the payment of this overplus, or the supply of the deficit, come out of the debts due to the firm.

This agreement comprehends, so far as we can gather, all the claim which Martineaux & son, had on the plaintiff, with the exception of a note for two thousand dollars, dated the 2d of July, 1818, payable to Charles Martineaux, on which a separate suit has been

brought, and which by the consent of the parties, has been consolidated with this.

The plaintiff, in his petition, avers, that the act of mortgage, on which the defendants have sued out an order of seizure, and sale was given by him in error; that he thought, at that time, the sum expressed in the said deed was due the defendants, as agents of Martineaux & son, but that in fact, nothing was due. The petitioner proceeds to state the transactions which he had with Martineaux & son, and avers that he has paid their agents the present defendants, nine thousand dollars, through the hands of Josiah S. Johnston; that the proceeds of certain cotton and peltry, in France, of which his share was $10325, had been received by Martineaux & son; that he had also paid them $5500, through the hands of Charles Martineaux; and another sum of $500, to Rochelle & Shiff, by a certain Mr. Booth.

The defendants, in their answer, admit some of the allegations in the plaintiff's petition, and deny others. They admit the receipt of $9000, per Johnston; deny the payment of $5500 to Charles Martineaux; and that they have received $500 from Booth. They require proof of the sum alleged to be paid in

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France; and they aver that the plaintiff, on the dissolution of the partnership bound himself to pay the debts of the firm; that the sum of $1618 19, was owing by the partnership to the defendants; that the sum paid by them to M'Master, of $2722, was due by the plaintiff, in his individual capacity; and that the whole amount which they had a right to demand from him, was $27340 93, with interest from the day of ———. After hearing the proof adduced in support of the allegations of the respective parties, the district court gave judgment for the plaintiff, and perpetuated the injunction. The defendants appealed.

The plaintiff annexed to his petition, various interrogatories, some of which, with the answers made by the defendants, are material.

In the fifth he asks, what was the amount due them by Martineaux & son, on the 8th of April, 1818, the date of the dissolution of the firm?

To which they answer, $1417 22; and that this sum, with interest, afterwards amounted to $1618 93.

By the seventh they are interrogated, "Did not Charles Martineaux pay you the sum of $5500, in the spring or summer of the year

1818, which sum was sent by petitioner, on account of the debt due at that time by Martineaux & son; and did not Booth pay you $500?"

To this they reply, that during the spring and summer of 1818, they had several transactions in cotton, bills, &c with Martineaux & son, but never received from them the exact sum of $5500, alluded to in the petition, nor did they receive, at that time, any money from Landreau, on account of Martineaux. They acknowledge the receipt of $500 from Booth, but do not know whether he paid it on account of the petitioner, or Martineaux & son.

The principal payments on which the defendants rely, are as follows:

1. The one third of the proceeds of cotton and peltry sold in France.

2. The sum of $9000, paid by Josiah S. Johnston.

3. $5919, paid to Charles Martineaux.

In support of the first, he produces the original articles of agreement, in which Martineaux & son, acknowledge that the amount of sales shall be equally divided between them, and their account current, by which the part of the petitioner is shewn to be $9400. In op-

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position to this credit to the extent claimed by the plaintiff, the defendants shew that by the account current which is introduced by the former, it appears that Martineaux & Son, have paid to his mother, and wife, in France, a considerable portion of this money, and it has been contended that this payment must be presumed to have been by his consent and approbation; that the property, at all events, belonged to his mother; and, lastly, that he has approved of this application of his funds, by introducing an account current, in which this payment is stated to have been made.

We see nothing in the evidence, which authorises us to presume the petitioner assented to this payment. Admitting the property to belong to the mother, we do not think that Martinaux & son were authorised to make *a voluntary payment* to her, in opposition to the express stipulation they made in the contract, by which the plaintiff purchased their share in the partnership. The words of the agreement are, "that the amount arising from the sale of the cotton and peltries shall be applied by Jean Charles Louis Martineaux, and Charles Martineaux, to the payment of so much of the amount of the notes of Pierre Landreau."

After this stipulation on their part, which is one of the conditions on which the petitioner made the purchase, they had no right to apply the funds in their hands to another purpose. The production of the account current, is an acknowledgement that such a payment was made, as is stated, but not that it was legally made.

The amount paid by Johnston is not certified.

The greatest difficulty, in the case, arises from an alleged payment made to Charles Martineaux, which is said to be evidenced by a document of which the following is a literal translation.

"I, the undersigned state, that the amount of drafts and notes below, are to the discharge of *M.* Landreau, for the account of *M*artineaux & sons with Rochelle & Shiff."

After giving a list of the notes, &c. he concludes "which $5919 60, I declare to be at the discharge of the account, which we have with Rochelle & Shiff, on the particular account of M. Landreau, which account I have said to be $6600"

This receipt is dated the 20th April, 1818, and signed —— Charles Martineaux & son.

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The terms of this receipt have given rise to much argument. We think the idea expressed by them is, that the amount received is to be applied to extinguish a debt which Martineaux & son owed Rochelle & Shiff, on account of the petitioner. The petitioner says, it means that the firm of Martineaux & son owe $6600 to Rochelle & Shiff, which is to be paid by Landreau. The defendants contend that it is a certificate, which states that certain bills and notes are at the credit of Landreau's private account with Rochelle & Shiff. Neither of these conclusions is supported by the language of the instrument, which states that the papers and notes, there n mentioned, are at the discharge of the account of the persons who sign it, with Rochelle & Shiff, on the particular account of M. Landreau. It is clearly the account of Martineaux & son that they are placed to the credit of, and it is equally clear that they contemplate that account to have been contracted for Landreau.

With this understanding of the instrument, we proceed to examine what effect it should have in this case. The plaintiff contends that, as it appears only $1407 were due to Rochelle & Shiff by Martineaux & son, at the time the

latter and the petitioner dissolved partnership, all the surplus should be credited on the notes he executed in their favor; while on the other side it is insisted that it is an acknowledgement of a personal debt due by Landreau, which he has not disproved, and that if he has established it to be a partnership debt, it amounts to nothing more than an error in estimating the debts of the firm, and that consequently Martineaux & son are entitled to two thirds of the overplus. We have already said these obligations were given to pay a debt, which the parties seem to have considered Martineaux & son had contracted, to Rochelle & Shiff, on account of Landreau. The question then is, does the evidence sufficiently contradict the acknowledgement, on the part of the latter, that such a debt was due? We think it does. We have the answer of Rochelle & Shiff, that on the 6th of April, of that year, Martineaux & son, only owed them 1417 dollars. Now, if they had an account, at that time, with Rochelle & Shiff and owed them 6600 dollars, it is impossible the answer of the defendants can be correct. But that cannot be disputed by them. It is, indeed, barely possible, that the debt was contracted between

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the 8th of April, to which time the answer to the interrogatories refers, and the 18th, on which the receipt was taken. But, besides the improbability of this, owing to the distance of the parties, &c. the defendants in another part of their answer swear, that this sum of 1417 dollars, with interest, was all that was due to them by Martineaux & son, on account of these transactions, at their departure from France. Another circumstance strongly corroborates the idea that there was error or fraud in this transaction: The defendants, in their answer, enter into a history of the transactions which they have had with the principals and the plaintiff, in relation to the matters involved in this controversy. They are minute in their statements. They make no assertion that any such sum was due them by Martineaux & son, at any period of time, as is mentioned in the receipt. They produce a schedule made by the plaintiff himself, on the 15th of April, three days before passing off these notes, in which not a word is said of his either owing Rochelle & Shiff, or the persons for whom they are agents, such a sum as 6600 dollars, and as to his having a personal account with them for that amount, it is expressly contradicted

by the answers to the interrogatories propounded.

The greatest difficulty in the administration of justice, is ascertaining the truth in relation to facts, and notwithstanding all the evidence, which has been offered, it does still appear extraordinary that such an assignment should have been made, when no such a debt existed. It cannot be easily accounted for, except by supposing gross ignorance in one of the parties. But it is still less easy to reconcile the evidence in the cause, with the acknowledgment which the receipt taken contains. Indeed, it is impossible to do so.

On the whole, we think, that a credit must be given to the petitioner, for the net proceeds of one third of the cotton and peltries sold in France; for the money paid by Johnston: for that expressed in the receipt by Martineaux; and for the 500 dollars paid by Booth; adding them together, fully justifies the judgment of the district court, as it respects the appellant, and not being complained of by the appellee, it can have no amendment as it respects him.

In considering the rights of the parties, we have viewed the defendants in their character as agents alone, consequently, any claims they

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may have in their own right, are untouched by this judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs, so far as it confirms the injunction; and that it be annulled, avoided and reversed, so far as it decrees the plaintiff, Landreau, to pay to Rochelle & Shiff, $707 63, without prejudice to the right of Martineaux & son, in case they should hereafter shew that the payment made to the mother and wife of Landreau in France, as stated in the account current filed in the case, was made under the authority of said Landreau.

Johnston, Debleux & Morris for the plaintiff, *Bullard & Johnston* for the defendants.

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If a party withhold proof in his power, which he is not bound to produce, the court may remand the case for a new trial.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The facts of this case are the same as those in that of *Campbell* vs. *Miller*, lately argued—*Post*, 514. The defendant pleaded the general issue and a fair purchase. He had a verdict and judgment, and the plaintiffs appealed.

The statement of facts shews that Platin deposed, that in 1818, the plaintiff was possessed of Maria, a slave, about fourteen years of age, and of her mother, Mary, and her brother Perry. The witness was overseer of the plaintiff for a month, during which time the slaves were on the plantation.

Grafer deposed that he knew Maria on the plaintiff's plantation, in 1817. The plaintiff married in 1816, and got her with his wife. He knows the wife had a girl of that name before her marriage. He knows the mother Mary and her brother Perry, who were in the plaintiff's possession. He does not know whether the girl in the defendant's possession, is the one possessed by the plaintiff He has not seen her since 1817.

Walker deposed that, in the state of Mississippi, a written sale of slaves is not required by law. Slaves are personal property and acquired to the husband by marriage.

Calvet deposes he has sold many slaves in that state, and thinks the law requires a written sale.

Prescot deposed that, in the fall of 1822, he was the plaintiff's overseer. On the 12th of March five slaves ranaway, *i. e.* on the 12th

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or 13th in the morning:—Maria, a jet black negro, about 17 years old, with a downcast countenance, was one of them. In November, 1822, he went with the plaintiff to the defendant. The plaintiff claimed Maria and asked to see her. The defendant said he had a girl of that name, answering the plaintiff's description, but declined shewing her, being informed this would injure him. He said he had bought her from Collier. The witness knew Maria had a brother called Perry, and a mother named Patsey, of this he is not very certain. The description given by the plaintiff was the same as that given by the witness in *Campbell vs. Miller*. The witness in that case, made a mistake as to the month in which the negro escaped. By reference to hisnotes he finds it was in March.

Fleming deposed that Maria was in the plaintiff's possession ever since his marriage. She left him in the year 1822. She is the girl described by Prescot. She was about 16 in 1822—he has not seen her since. Her mother was named Patsey, and her brother's Perry. The plaintiff asked the defendant whether he had not a girl named Maria, very likely, somewhat downcast. He answered he had,

but could not shew her, being told that this might injure him in the suit. She was sold to the defendant by Collier. The witness does not know or recollect any thing striking in the appearance of the girl. He was frequently at the plaintiff's and often saw her.

Bowles deposed that the defendant has a black girl, called Maria, about 18 or 19 years old. She has neither a downcast, nor a lively look.

Calvet, a witness for the defendant, deposed he had heard the plaintiff's testimony. Maria, in the defendant's possession, is thick set, heavy made, has a bold look, very remarkably large breasts. He never knew the defendant to have but two slaves named Maria—one an old woman. He has known the girl in the fall, winter and spring, and saw her a week after the defendant got her, and noticed her large breasts.

The defendant introduced an authentic bill of sale for Maria, from George Collier, dated March 28, 1823, duly recorded.

The record shews that the plaintiff made an unsuccessful motion for a new trial.

We are of opinion, that the justice of the case appears to require, it should be sub-

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mitted to another jury. The defendant had it in his power, by producing the slave in his possession, to shew that she is not the plaintiff's. He was under no legal obligation of doing so; but we think that his refusal, and the whole circumstances of the case, demand that there should be a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded for a new trial—the costs of the appeal to be borne by the defendant and appellee.

Oakley and *Thomas* for the plaintiff, *Wilson* for the defendant.

CAMPBELL vs. *MILLER.*

If the case turns on the identity of property in the defendant's possession, which he refuses to let the witnesses see, and there be a verdict in his favor, the court will remand the cause for a new trial.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff complains that the defendant has unjustly deprived him of two slaves, of whom he had been for a long time in quiet possession, as owner. He prays that the latter may be decreed to deliver them back and

pay damages, and that, in the meanwhile, they be sequestered.

The defendant pleaded the general issue and that he might be quieted in his possession

In an amended answer he pleaded, that if the slaves ever were the plaintiff's property, they have ceased so to be, and were by him or his agent sold, and he received payment therefor.

The affidavit of a juror not admissible to impeach the verdict.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

The statement of facts shews that—

Patton deposed, that in 1818, he was the plaintiff's overseer for a month. He knows the slaves claimed, Paul and Brandon, whom the plaintiff brought to his plantation. Paul was black and chuncky, about 25 or 30 years of age. He does not recollect him as well as Brandon, who was 35 or 40 years old, his color black, inclining to yellow; he had a heavy beard, and complained of rheumatism. The witness went to Natchez and brought the slaves hence A few days after he went to live with the plaintiff, and has not seen them since he left him.

Ruton deposed, he was the plaintiff's overseer in 1822. Brandon is nearly jet black,

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40 or 45 years old, 5 feet 6 or 8 inches high—Paul, jet black. 30 or 35 years old, nearly 6 feet high. These negroes, with three others, disappeared on the 11th or 12th in the evening. He left the plaintiff a few days after, and has not seen the negroes since. Last fall he went with the plaintiff to the defendant's. The latter said he had two negroes answering the above description, but refused to let the plaintiff see them, as he was told it would injure him. He added he would hold them as long as he could, as a Mr. M'Donald had behaved improperly; but if the plaintiff had come himself, he would have acted differently. The negroes were able bodied; the two worth 28 dollars a month, exclusive of clothing, in the state of Mississippi.

Flannin deposed, that about three years ago, he saw these negroes in the possession of the plaintiff. He saw them very often since, [but they absented themselves in the spring of 1822] in the plaintiff's possession. Collier was the plaintiff's overseer in the fall and winter of 1821 and 1822, and was discharged at the end of the winter. The plaintiff has a farm and about 80 negroes, on Pine Ridge, in the state of Mississippi.

Manfro deposed, he could not describe the slaves, but they are those purchased by the defendant from Collier, called Paul and Brandon. He did not particularly attend to the description given by the preceding witnesses, but he could not recognize them under it, except that they are black. Paul is from 40 to 45, and Brandon about 30 years old.

M'Daniel deposed, that he had seen Collier in Alabama, two or three years before. He was worth about 20 000 dollars, and bore a good character. He knows that some of the negroes sold by Collier, came to him from his father. Negroes would have been worth about 260 dollars per year.

Henderson deposed, that Brandon was not exactly right black; 5 feet 5 or 6 inches high, appeared to be above 30. He did not take particular notice of Paul, who seemed advanced in years, apparently drooping and moving slowly. Negroes would be worth 180 dollars, exclusive of expenses. They were purchased in good faith. The witness gave a draft for 250 dollars, as part of the purchase money.

The defendant gave in evidence his note for 950 dollars to Collier, endorsed to M'Daniel.

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It appears that the plaintiff moved for a new trial, on the ground that—

1. The verdict is against law and evidence, in being for the defendant, who exhibited no title.

2. The plaintiff was taken by surprise, by the production of the note to Collier, as if it had been offered earlier, he could have rebutted the suspicion of collusion arising from it.

3. One of the witnesses stated, incorrectly, that the slaves ranaway in *April*, instead of *March*, 1823.

4. Complete justice was not done, nor can it be, without the production of the slaves in court, to establish the identity.

5. One of the jurors, Scott, after they had retired, communicated certain facts to the others.

There is nothing in the first ground taken. The plaintiff could not expect a verdict, even when the defendant produced no title, if he did not himself establish a good one, or his right of possession, and identify the slaves. We think that the affidavit of a juror is not admissible, to impeach the verdict on account of misconduct—4 *Binney*, 150

The defendant stood under no legal obliga-

tion to produce the slaves to the plaintiff. The latter did not make any application to the judge to have them brought into court. Yet, as the defendant might, by producing them, have put the question beyond doubt, and the other grounds have some weight, we think the new trial ought to have been granted.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded for a new trial—the costs of the appeal to be borne by the defendant and appellee.

Ockley and *Thomas* for the plaintiff, *Baldwin* for the defendant.

BALDWIN vs. *MARTIN & AL.*

APPEAL from the court of the sixth district.

If the appellant obtain the judge's order for an appeal before the expiration of two years, the citation may be served afterwards.

Service of petition at the *last place of residence* of the defendant is *bad*.

MATTHEWS, J. delivered the opinion of the court. In this case the plaintiff claimed, as creditor of one of the co-heirs of the succession of Gabriel Martin deceased, a partition of said succession, to enable him to levy an execution on the portion of his debtor, against whom he had a judgment. Having obtained a decree

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for partition, the judgment remained long without any appeal, which was finally taken, returnable to the present term of this court, by two of the defendants only.

The appellee moves to have the appeal dismissed, on two grounds—1st, Because the service of the citation was made since the expiration of two years from the date of the judgment of the court below. Although the appeal was prayed for and obtained within that period—2nd, That the citation is defective, because the caption, states it to be in a case of the appellee vs Mary Martin & al. whilst the petition of appeal is in the name of J & G. Martin.

As to the first of these objections to the legality of the appeal, we are of opinion that it was not barred by the failure to serve the citation within the two years to which suitors right to appeal is limited. The requisition of the law is complied with, as within that time the appellant may obtain the judge's order granting an appeal.

The objection to the citation, on account of uncertainty, is not supported. The record shews clearly, that the present appellants were considered as parties to the suit of Mary Mar-

tin & al. and as a judgment was pronounced affecting their interest, this gives them a right to appeal—*Id certum est quod certum reddi potest.*

The case is brought up without statement of facts, &c. But errors are assigned as apparent on the face of the record; amongst which is the want of serving citations on the appellants. The return of the sheriff states, that he left citations for them with their mother at their *last place of residence.* In judicial proceedings, where personal serving of process does not actually take place, to bring a defendant into court, its want cannot be supplied, unless by pursuing strictly the provisions of law, which substitute any other species of service. When a defendant cannot be found, the law authorises service by leaving copies of writs at his usual place of abode, which must be left with some free white member of the family, above the age of 14 years. Now, it appears to us that there is a total difference in the ideas conveyed by the expression "last place of abode or residence," from those implied by the expression "usual." According to the first expression, the person alluded to would be considered as being no longer a resident in the

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same place; whilst the second implies only a temporary absence.

In the present case the record does not shew a personal service on the appellants, and this deficiency is not legally supplied by the manner in which it appears service was made of the original citation. We therefore conclude, that they were not parties to this suit, and consequently, the judgment herein rendered is, as to them, null and void. Being of opinion that the appellants must prevail on this error assigned, we deem it unnecessary to examine any of the rest.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, so far as it relates to the present appellants, be annulled, avoided and reversed; and that the appellee pay the costs of this appeal.

Baldwin for the plaintiff, *Thomas, Scott & Johnston* for the defendants.

SMOOT & AL. vs. *RUSSELL.*

Whether an instrument of writing which declares that property was sold to se-

APPEAL from the court of the sixth district.

PORTER J. delivered the opinion of the court. The petitioners sue on an instrument

of writing, executed in the state of Alabama, by which it is declared that, in consequence of the plaintiff's having joined in a note, which the defendant had made with one S. Love, in favor of a certain Johnston, the defendant covenanted "that for the better security of the plaintiffs," and to indemnify them against all loss, or against the payment of said note, he had sold and conveyed certain shares, on the condition, however, that if he saved them from all damages and fully indemnified them from the consequences which might arise from their joining in the said note, then the obligation was to be null and void, otherwise to remain in full force and effect.

The law of Alabama has not been proved, and conformably to the uniform decisions of this court, we must decide this case by the provisions of our own. The first question raised for our decision is, whether this is a mortgage or a sale. The plaintiff has brought his action in such a manner as to claim the benefit of it, viewed in either light, but as the right of the parties are in no respect affected by the proper character to be affixed to the instrument, we find it unnecessary to go into the enquiry.

A mortgage is defined by our Civil Code to

cure the vendee against certain obligations, be a mortgage or a sale? *Quere.*

A clerk cannot certify to the contents of a paper in his possession; he must give a transcript of it.

When a record is admitted which contains within it evidence that is legal, and that which is not so, it will be presumed to be admitted to establish the former.

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be "a contract by which a person affects the whole of his property or only some part of it, in favor of another, *for security of an engagement, but without divesting himself of the possession thereof—Code*, 452, *art.* 1. This contract expressly states that, the property which is declared to be sold, is conveyed *for the security of an engagement*, and the vendor *does not divest himself of possession.* It would seem, then, to come almost within the letter of the definition, and there would be little difficulty, on our part, in saying that it came completely within it, were it not for a subsequent provision of the same authority, *article* 6, which declares that "there is no conventional mortgage except that which is *expressly stipulated* in the act or writing made between the parties; it is never understood and *is not inferred from the nature of the act.*"

Leaving, therefore, the question to be decided in a case, where it is necessary for a correct understanding of the rights of parties, we shall proceed to examine it as a sale, and if it should be found, that, considered in that point of view, the evidence which the plaintiff must produce is precisely the same, as will be required of him viewing the deed relied on as an

act of hypothecation, it matters little what name we affix to it.

To the formation of the contract of sale three things are requisite—a thing sold, a price and consent. The sale may be made purely and simply, or under a condition either suspensive or resolutive. No price was given here, nor any promised, but the contract expresses, that if Russell took up the note the contract should be null and void. Until that event was ascertained, the right to the property was suspended, and it is clear that if Russell had taken up the note when due, the plaintiffs could not have demanded an object, which was conveyed to them on the condition that they should be compelled to pay the note which they had signed as sureties—*Civil Code*, 344, *art.* 1, 346, *art.* 5, 274, *art.* 81. Had the slaves perished they would have been lost to the defendant, not to the plaintiffs; the former would still have remained under the obligation to take up his note, and would still have been liable to the latter, in case they had paid it; for the conveyance was made to *secure them*—*Civil Code*, 274, *art.* 82. This gives a test by which the true character of the transaction can be ascertained. *Res perit domino.*

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If the sale had been absolute, the thing sold would at once have been put at the risk of the buyer.

Whether this agreement, therefore, is considered as a mortgage, or as a sale contracted on a suspensive condition, the proof which the plaintiffs must produce is precisely the same. In either hypothesis, they must shew that they have paid the note mentioned in the agreement. In the first, because it was given to secure against the payment of that note, and until proof is given of injury there is no ground to claim indemnity; and in the second, because the contract is suspended until that event, which was to make it absolute, is shewn to have happened.

Whether that proof has been furnished or not, is the point in the cause which has been most disputed, and to which our attention was most drawn in the argument. The evidence of it is said to be furnished in the transcript of a record, certified by the clerk of Washington county, in the state of Alabama, of the proceedings in the case of *Ross* vs. *Russell & al.* This transcript contains a copy of the declaration and judgment; but the execution that issued on this judgment and the return on it

are not copied verbatim, but the substance of them given. We are of opinion that this is not sufficient. The law authorises a clerk to give *copies* of papers in his custody, and if, instead of giving copies, he gives what he understands to be their substance, he substitutes for a transcript of the record, his understanding of what that record contains, and he exercises a power which is certainly not ministerial. In place of facts he gives an opinion. If this evidence were received, it would establish a precedent which would lead to great inconvenience, and it would hereafter authorise the admission of any abridgement of a record which clerks might make, provided they certified that they had done so faithfully. *See* 1*st Haywood*, 410.

It has been contended, as no exception was taken to the admission of the record in the court below, that it is now too late to make it. But the rule is well established that when a record is admitted, which contains within it, evidence which is legal, and that which is not, it must be presumed to have been admitted to establish the former. We have had occasion to act on this principle, in the case of *Lartigue* vs. *Baldwin*—5 *Martin*, 193.

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We conclude, therefore, that as the plaintiffs have not furnished legal evidence of the payment of the obligation for which they bound themselves for the defendant, that there must be judgment for defendant as in case of nonsuit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for defendant as in case of nonsuit, with costs in both courts.

Thomas for the plaintiffs, *Baldwin* for defendant.

SMOOT & AL vs. *BALDWIN.*

APPEAL from the court of the sixth district.

A conditional sale followed by delivery, is a *vente a remeré.*

A sale made in another state of the union for a slave, need not be recorded here.

Delivery of slaves takes place by the delivery of a title which states that the slave sold has been delivered.

PORTER, J. delivered the opinion of the court. This action, like the preceding, is brought on an instrument executed in the state of Alabama, but of a very different nature from that we have just acted on. The latter was given in security, expressed no price, was not followed by delivery, and contained a clause that the contract should be null and void, in case the plaintiffs were not obliged to pay the debt, for which they had bound themselves as

sureties for the defendant. The one before us contains every requisite necessary to the formation of the contract of sale. It expresses the consideration or price to be four thousand dollars, warrants the title and acknowledges the delivery.

Below this instrument, there is another executed by the plaintiffs, in which they state that provided the vendor pays a note to which they have bound themselves as sureties, they will *re-sell and re-convey* the negroes mentioned *in the bill of sale.*

Under this and the previous act, the plaintiffs claim the slaves conveyed to them, and the defendant, who has since purchased the same property by public act, executed in this state, from Russell the vendor of the petitioners, thinks that his title is a superior one, and that he ought to be maintained in his possession and quieted in his title.

No proof being made of the laws of the country where this contract was executed, we must decide it by those which are in force in this state.

The description we have already given of the act under which the plaintiffs claim, expresses, in some measure our opinion as to its

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character. It appears to us to be a contract of sale, with the power or right of redemption annexed, *vente a remeré*. The expressions certainly make it such. The intention of the parties, as far as we can gather it, also supports this construction. It is clear the plaintiffs were not satisfied with any thing else for their security but a sale, pure and simple; that a mortgage or a contract of sale, on a suspensive condition, was not within their contemplation. The price stipulated, the delivery expressed, and their promise to re-sell and re-convey, if the vendor should comply with his engagement, exclude the idea that any thing else was intended.

The vendor, therefore, after this contract, could convey nothing to a second vendee but the right of redemption; admitting that this has been done by the sale of the slave, the right to pay the price, stipulated in the contract with the plaintiffs has not been claimed.

There remain two objections made by the defendant, which it is proper to notice, and express our opinion on.

He says that the plaintiffs cannot recover because their deed was not recorded within this state; but we think it was not necessary

for the assurance of their rights that such a step should have been resorted to. All that was necessary for them to do, was to see they had a legal title where they bought, and the right thus acquired could not be divested by moving the property into another country, where different regulations might prevail. The plaintiffs shew a title by public act in the state of Alabama. An instrument similar to that they exhibit, would, if executed in this state, have effect against third parties, from the date of recording. As the contrary is not shewn, we must presume its operation was the same in the country where it was passed. To say it shall not have the same effect here, that it had in the state where it was executed, would be in fact deciding that a man, for the assurance of his property, must have his titles recorded in every state in the union, and every country where registry acts are in force; and this we are not prepared to do.

He next contends that there was no delivery. On this head we refer to the Code—"The delivery of slaves takes place when the sale mentions that the slave has been sold and delivered to the buyer."—*Civ. Cod*, 350-28. This sale contains a clause, expressing that

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these slaves were delivered, and if Russell the vendor had them in possession, when he made that declaration, and kept them afterwards, his possession was that of the owner.

As to the declaration that these slaves were personal property, we can notice it only as an error in the parties—they are clearly not so by our law, and we can recognize no other in the decision of this cause.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Thomas for the plaintiffs, *Baldwin* for the defendant.

CRUMMEN vs. *CAVENAH.*

The admissions in an answer must be taken altogether.

APPEAL from the court of the sixth district.

MATTHEWS, J. delivered the opinion of the court. This action is brought to compel the defendant to enter satisfaction on a decree or judgment, heretofore pronounced in this court, by which the plaintiff was required to deliver over to him a negro slave, of a certain description, as therein specified, valued at 1200 dol-

lars, being the balance and remainder of the price of a tract of land, purchased from him by said plaintiff, and on which the seller retained a mortgage. The petitioner also prays, that the defendant may be compelled to cancel and release said mortgage. The cause was submitted to a jury in the court below, who found a general verdict for the defendant, from which, and the judgment thereon rendered, the plaintiff appealed, having previously moved for a new trial on the usual allegations of the verdict being contrary to law and evidence, and that justice had not been done between the parties. 12 *Martin*, 306.

The original contract required the giving in payment a likely negro man, between the ages of 20 and 25 years. The judgment, which is based on this contract, pursues its terms strictly, and cannot be satisfied, unless by the tender of a slave, exactly answering that description. In the present case, the evidence, as to the age of the negro tendered and received by the defendant, varies from 24 to 30 years of age. From 25 down to 20, the age required, the contract and decree would be satisfied: above or below these ages; the slave

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would fail in this part of the description, as contained in the contract of the parties.

The jury, whose duty it was to determine this matter, upon the testimony adduced on the trial, may, in our opinion, have fairly come to a conclusion, that the slave tendered was older than 25 years, and consequently ought not to be imposed on the appellee by the plaintiff, as a discharge of the former decree against the latter.

The counsel for the appellant relies much on the judicial confessions of the answer, as amounting to an acknowledgment on the part of the defendant, that he received the negro who was tendered in full satisfaction of his judgment. We are unable to give such a construction to that part of the pleadings: It contains a general denial in the first instance; and qualifies the acknowledgment of the rest of the property, by denying that it was taken, except for so much as it might be worth, &c.

The answer must be considered altogether, so far as it is consistent; and thus considered (we are of opinion) it does not amount to a confession, that the slave in question was received in full discharge of the appellee's claim.

This court, does not perceive that the verdict

and judgment of the court below, are contrary to law and evidence, or that injustice has been done. The plaintiff not having made out his case,

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that judgment be here entered as in case of nonsuit, and that the plaintiff pay costs in both courts.

Baldwin for the plaintiff, *Scott & Thomas* for the defendant.

HAM vs. *HERRIMAN.*

APPEAL from the court of the sixth district.

The mere fact of relationship, between parties to an act, is not sufficient to establish it was fraudulent

MARTIN, J. delivered the opinion of the court. The defendant having caused a *fi. fa.* issued on a judgment against S. Ham, to be levied on two slaves, the plaintiff obtained an injunction on an allegation that they were his property.

The answer denies the allegation, and avers that the sale, if any exist, is a fraudulent one.

There was a verdict for the defendant, and

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the injunction was dissolved—the plaintiff appealed.

The plaintiff at the trial produced an authentic bill of sale for the slaves, executed by the defendant, on the fi. fa. before the judge.

Cleveland, a witness for the defendant, deposed, that S. Ham, the defendant on the fi. fa dwells on a tract of land, the property of Moore of Opelousas; that the plaintiff is her son and dwells with her; that there are no slaves on the land, but those mentioned in the bill of sale.

Stafford deposed, the plaintiff has dwelt with his mother, ever since he knew him—*i. e.* about ten years.

Bonit deposed, he has been a neighbor of the plaintiff, for seven years, and has had a good opportunity of knowing his situation. He was absent during a short time only. The appellant traded in horses. He does not know of any other pecuniary transaction. He knows the slaves mentioned in the bill of sale.

The judgment against S. Ham, on which the fi. fa. issued, was produced.

We are of opinion the district court erred. There is no evidence of fraud, except the very slight presumption, which may be said to

result from the near relationship existing between the parties. There is no evidence of a want of other property, to satisfy the execution.

The case is hardly distinguishable from that of *St. Avid & al.* vs. *Weimprender's syndics*—9 *Martin*, 648.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and proceeding to give the decision which, in our opinion, ought to have been given below,

It is ordered, adjudged and decreed, that the injunction be made perpetual, and that the defendant pay the costs in both courts, reserving, however, to the defendant, his right of establishing the fraud in an action to set aside the sale.

Baldwin for the plaintiff, *Johnston* for the defendant.

SOUTHWORTH & AL. vs. *BOWIE.*

APPEAL from the court of the sixth district.

A minor above the age of puberty, may contract, if the engagement be advantageous to him.

PORTER, J. delivered the opinion of the court. This case presents two points for decision;

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the first is, as to the correctness of the opinion of the district judge, on a question of law arising on the trial; and the second, as to the liability of the defendant, on the contract which forms the basis of the action.

The proceedings commenced by an order of seizure and sale, granted on an application of the plaintiffs, who averred that an obligation by authentic act executed by the defendant, in favor of a certain Stephen Herriman, had been duly transferred to them by a public instrument of writing, executed before a notary public. On attempting to carry this order into effect, the defendant applied for, and obtained an injunction, on the ground that he was a minor, at the time he executed the obligation on which the plaintiffs had sued him.

On this allegation of minority an issue was joined, and several facts were submitted to a jury; among others, one on the part of the defendant, in the following words, "was the consideration of the mortgage for articles, dealings &c. useful and necessary for the defendant, and what were they?" Before the jury retired the party submitting this fact, requested the judge to charge them to find "absolutely that the consideration of the mortgage by the

defendant was advantageous to him, or was not advantageous to him." The judge refused to do so, and, in our opinion, correctly, for the evidence may have been such that it was impossible for the jury to find, that the consideration of the obligation, *i. e.* the whole consideration, received by the defendant, was beneficial or was not. The verdict rendered, shews, that they conceived there was a necessity for distinguishing between that part which had been useful to the obligor, and that which had been otherwise. Nothing, surely, can oblige a jury to answer categorically, on a question proposed to them, when the evidence does not enable them to do so safely.

The next question is one of some importance, and is now presented, for the first time, for our decision. It is, whether a minor above the age of puberty, and under that of majority, is legally bound by contracts useful and necessary to him, which he may have entered into between these two periods.

It appears to have been a question of great difficulty with the commentators in the civil law, whether a minor under the age of puberty could enter into any obligation, either civil or natural, and the provisions found in the

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Digest, in which the advocates of the different doctrines on this subject, found their opinion, cannot perhaps be reconciled—See *Dig. liv.* 2, *tit.* 14, *l.* 28, *ibid*: *liv.* 12, *tit.* 6, *l* 41: *liv.* 35, *tit.* 2, *l.* 21: *liv.* 45, 1 *liv.* 127: *liv.* 46, *tit.* 2, *liv.* 1, *sec.* 1: *liv.* 46, *tit.* 3, *law* 95, *no.* 2. It does not, however, appear to us to have been doubted that the minor above the age of puberty was capable of contracting an obligation which bound him, if it turned to his profit; and on this head it is unnecessary to refer to the opinion of jurists, as we have positive law: By the 4th law of the 11th title of the 5th Partida, it is expressly declared that, the promise of the minor above fourteen years of age is binding, if that promise is advantageous to him. Our Code does not seem to have introduced any change on this point; on the contrary, by giving persons of that age the right to rescind their contract, it would seem to recognize their existence—*Civ. Code*, 302, *art.* 214–212, *Febr. Par.* 1, *cap.* 4, *sec.* 1, *no.* 3: *Par.* 3, *tit.* 18, *law* 59.

Our conclusion, therefore, is, that a minor is not incapable to contract, but that he is rendered incapable to injure himself by contracting, and if in the instance before us, the jury

had found that the engagement, the defendant entered into, had been useful and advantageous to him, wo should have felt it our duty to enforce it.

But the verdict informs us it was only in part so, and it does not inform us in how much, we are therefore unable to decide with correctness on the rights of the parties, and the cause must be remanded, in order that this fact, so important to a correct decision of the cause, be ascertained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that the case be remanded for a new trial; and that the appellee pay the costs of the appeal.

Thomas for the plaintiffs, *Baldwin* for the defendants.

JOHNSTON'S EX'R. vs. *WALL & AL.*

APPEAL from the court of the sixth district.

Amendments may be allowed at any stage of the pleadings, but if it appear that the cause has been as fully tried on its merits, as it would have

PORTER, J. delivered the opinion of the court. This action has for its object the recovery of certain slaves, mentioned in the petition, and damages for their illegal detention.

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been with the amendment, the supreme court will not remand the cause.

An application to remove a cause to the court of the U. States, must be simultaneous, with the appearance.

A seizure made under a writ, after the return day thereof, is void.

The marshal may be sued in a state court for trespass.

It was originally commenced against the three defendants already named, and the plaintiffs averred that the property had been seized by Lackie, pretending to be deputy marshal of the Louisiana district, and by him sold to Wall, as agent of the other defendant, John Stiles; at whose suit, the said marshal had caused the slaves to be seized and exposed to sale.

The defendants pleaded severally: Stiles claimed and obtained the removal of his cause into the United States' Court, on the ground that he was a citizen of Virginia. Lackie pleaded, that, in the seizure made by him, he acted as deputy marshal, under an execution issuing from the district court of the United States for the Louisiana district. And Wall presented, as his defence, the sale from the other defendant, Lackie, which he averred had been duly made under proper authority.

There was judgment in the district court against the defendants, Lackie and Wall; that they deliver up possession of the five slaves claimed in the petition, and pay him for the same, at the rate of forty dollars per month, from the institution of this suit until final delivery.

Wall has appealed, and the judgment, as it

affects him, is alone presented for our revision.

The facts of the case, as they appear in evidence, are, that Curtis purchased, in his life time, from Stiles, the slaves sued for; and executed an obligation, with mortgage, to secure the purchase money. Failing to comply with his contract, the mortgagee, who is a citizen of Virginia applied to the district court of the United States for the Louisiana district, and obtained an order of seizure and sale, directing the mortgaged property to be sold to satisfy the debt due him.

This order of seizure and sale was dated on the 9th day of April, 1822, and came into the hands of the deputy marshal, on the 16th of the same month, but no seizure was made under it, until the 20th of July, five days after the period fixed for its return, on the third Monday of that month.

At the sale made by the marshal the defendant Wall became the purchaser as agent of the plaintiff Stiles; the slaves were in the possession of the former, at the commencement of the suit, and were sequestered: and he gave bond in his own name, that they should be forthcoming to answer the judgment of the court.

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The first question which the case presents, is on a bill of exceptions. It has been already stated that the appellant pleaded title to the property, by virtue of a sale from the deputy marshal. When the cause was called for trial, Wall, by his counsel, moved the court to permit him to plead that he had purchased the slaves and held them as agent for John Stiles, the plaintiff, at whose suit they were sold. This the judge refused permission to do, and his decision was excepted to.

We agree with the appellant that amendments to pleadings should always be allowed, where they tend to the furtherance of justice, and we entirely agree with him, that the granting of that which was asked for in the present case, would not have imposed on the plaintiff the necessity of producing further proof, nor have occasioned any hardship to him. Without therefore expressing any opinion as to the propriety of the judge *a quo* refusing an amendment which could have had so little effect, on the decision of the case, we are all clearly satisfied that it would not be a sound exercise of the discretion which the law, in cases of this kind, has vested us with, to remand the cause, and thus put the parties to

the delay aad expense of a second trial. We are unable to perceive how the fact of the defendant being the agent of the plaintiff could, in any respect have varied the result. Whether he purchased for Stiles or not, if the sale was not made in pursuance of the formalities prescribed by law, he acquired no title to the property; and whether he held the slaves in his own right, under such purchase, or as agent, he is equally responsible for the hire. Men cannot protect themselves against the responsibilities which the law creates, on their holding the property of others, by shewing that they did the acts complained of as agent, unless in casses where their principal could legally authorise them. Now, from the evidence taken, coupled with the answer filed by Stiles himself, previous to his removing the cause to the court of the United States, so violent a presumption is raised of his being incapable to give any authority which would protect the defendant, that we do feel it would be doing a vain thing, and one which could not profit the appellant, to remand the case to the district court.

It has been contended that if this plea had been received, the appellant could have trans-

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ferred his case, with that of the principal to the district court of the United States. It is clear, however, no such removal could have been granted, after an an answer to the merits was put in; the appearance in court and the application to remove (unless in cases most peculiarly circumstanced) must be simultaneous—2 *vol. Law of United States*, 61, *Duncan* vs. *Hampton*, 12 *Martin*, 96.

The case, on its merits, presents one of the utmost simplicity. We are of opinion that the force and effect of the writ was spent on the close of the return day; that the service made under it, after the expiration of that time, was illegal; and that the subsequent sale was null and void, and vested no title in the purchaser. *Reeves* vs. *Kershaw*, 4 *Martin*, 573; *Dufour* vs. *Camfranc*, 11 *Martin*, 697. There can be no doubt the acts of a marshal, deriving his authority from the courts of the United States, are examinable in ours; the point has been already settled in this tribunal after solemn argument—*Dun & Wife* vs. *Vail*, 7 *Martin*, 416.

As to the objection taken to the form of action, we are clear that which was used here, is such as the case required.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Johnston & Thomas for the plaintiff, *Wilson* for the defendants.

DESHAUTEL vs. *PARKINS, USE OF CAMPBELL, RICH & CO.*

APPEAL from the court of the sixth district.

A special mortgage attaches on property which the mortgagee acquires after mortgage, if it be particularly enumerated in the act.

PORTER, J. delivered the opinion of the court. The petitioner avers that she has a legal title to a life estate in two slaves, the one named Joe, and the other Milly, by virtue of a conveyance from Frederick Kimball, of date the 10th of December, 1819. That ever since the date of the conveyance, she had the peaceable and uninterrupted possession of these slaves, until Isaac Parkins and Samuel Parkins, acting for a certain Campbell, Ritchie & Co. seized them under a pretence that they had been the property of a certain Middleton W. Kimball, and by him mortgaged to Isaac and Samuel Parkins.

She prays an injunction against further pro-

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ceedings on their part; that her title be quieted; and that the defendant pay costs.

The defendants, besides the general denial, plead fraud, and aver the property seized had been mortgaged by Middleton W. Kimball, prior to his selling it, to Frederick Kimball, under whom the plaintiff claims.

The district court perpetuated the injunction as to one of the slaves, and dissolved it as to the other. The plaintiff appealed, and the defendants have assigned for error, that the injunction should have been dissolved as to both.

The title of the plaintiff is shewn by an act of partition, of date the 15th September, 1818, executed between Middleton W. Kimball, and the tutor of her grandson, Napoleon Kimball, by which act two negroes, one called Joe, and the other Milly, were set apart as the property of the minor; by proof that this child died in July or August, 1819; and that his father, Middleton Kimball, who was his heir, by public act, conveyed these slaves to Frederick Kimball, who on the 10th December, 1819, transferred to the plaintiff in this suit, the usufruct in them for life, as claimed by her in the petition.

The defendants, on their part, exhibit a public act, by which it appears that Middleton Kimball, on the 23d January, 1819, mortgaged to Isaac Parkins, jun. & Co. a variety of property therein specified, among which are enumerated two slaves, viz: Milly & Joe.

And that on the 5th of April, of the same year, the parties to this act, executed another which is produced in evidence, and in which it is declared that an error had been committed in mortgaging one of the slaves just mentioned, and another called Tony, the mortgagor not having any legal title to them; and that in consequence of the want of title he hypothecated a tract of land, situated in the parish of Avoyelles, and another negro woman.

Parol evidence was introduced on the part of the plaintiff, by which it was established that at the time of the mortgage, executed in favor of Parkins, the negroes claimed were in the possession of the plaintiff; that the mortgagor had an African man named Joe; that the boy of this name, now claimed, is the son of a slave called Rachel, who with two other of her children were included in the mortgage given to Parkins; and that Milly, mentioned in the petition, is the same who was hypothecated by Kimball to the defendants.

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On this evidence, there cannot be a question as to the correctness of the district court, so far as it respects the slave Joe. He was not the property of the mortgagor, at the time of executing the act, nor was he in his possession; and the other slave, by the same name, was both owned and possessed by him at that time. We cannot, therefore, hesitate as to which the mortgage intended to apply.

As it regards Milly, it is proved that she is the same who was mortgaged to Parkins, and on the part of the defendants, it is contended that as the mortgagor by the death of his child, inherited the slave before he transferred her to Frederick Kimball, this mortgage although taken at a time when Middleton Kimball had no title to her, attached to the property the instant he became owner; and, consequently, gives them a preference over the plaintiff, claiming under a subsequent vendee.

In this position we concur. A general mortgage operates on all the property of the mortgagor, as well that which he owns at the time of passing the act, as that which he subsequently gets a title to. There is the same reason why a special mortgage on a particular object, should attach to that object, when sub-

sequently acquired by the person who has previously hypothecated it—*Civ. Code*, 456, *art* 28, *Cur. phil. lib.* 2, *cap.* 3, *hypoteca, no* 4.

Nothing found in the second act, passed between Kimbal and Parkins, enables us to say, that the mortgage, previously given on this slave, was renounced. The parties at the time acted on the idea that it was not valid, by reason of want of title in the mortgagor, but the former act was neither annulled nor avoided, nor any right which it conferred abandoned.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Thomas for the plaintiff, *Wilson* for the defendants.

STAFFORD vs. *STAFFORD.*

Sentence of interdiction cannot be pronounced on exparte evidence.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The plaintiff applied to the parish judge of Avoyelles, to have sentence of interdiction pronounced on the defendant, his sis-

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er. After hearing evidence, taken for the purpose of proving the facts on which that interdiction was demanded, the judge acceded to the prayer of the petitioner, and decreed accordingly.

The defendant having been informed of this decree, presented a petition of appeal which was granted, and the cause carried regularly to the district court. On coming to trial there, no other evidence being offered in support of the demand for interdiction, than that which had been taken *ex-parte* in the court of probates, the district court gave judgment, and the plaintiff appealed.

It is the opinion of this court that the district judge did not err. The right to cross-examine witnesses is one of vast importance to the citizen, and the rule of law by which that right is assured, cannot be dispensed with, unless in cases where the legislature have clearly established a different principle. It is contended they have done so in that now before us, because the first evidence must necessarily be *ex-parte*, and the law has provided that the superior court may, *if they deem it necessary*, proceed to the hearing of new proofs. The error in this argument is, in supposing the

first proof must necessarily be *ex parte*. If indeed, the party interdicted is in reality insane, the examination must necessarily be *ex-parte*, although he is cited to hear it. But, if on the the contrary, the petition of interdiction is solicited, from malice, or through error, against one of sound mind, it is not perceived by us why the proceedings should be carried on, without his knowledge. So far from it, that we think it indispensable he should have the opportunity afforded him to hear and confront those, who by their evidence are about to deprive him of all control over his actions, and take from him the enjoyment of his property. The defendant had a right to demand in the appellate court, legal proof of his insanity, and that legal proof was not furnished by testimony taken out of her presence. The principles on which this case has been supported might place the wisest man in the community under the control of a curator, and hold him up to the world as an adjudged insane.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

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Baldwin for the plaintiff, *Thomas* for the defendant.

STAFFORD vs. *GRIMBALL.*

The sale of land carries with it all stipulations in regard to the property conveyed.

APPEAL from the court of the sixth district.

MATTHEWS, J. delivered the opinion of the court. This action is founded on a contract, entered into between Cheney the plaintiff's vendor, and certain other persons, who are parties to the same, relative to the manner in which the lines of their claims to land, under an act of congress granting to them the right of pre-emption, should be run.

The answer contains a general denial, and, also, a special plea, that the plaintiff, being no party to the agreement, is not entitled to its benefit, and cannot enforce the stipulations therein contained. The cause was proceeded in, by the district court, to final judgment in favor of the plaintiff; from which the defendant appealed.

It is evident from the statement of facts and judgment of the court below, that the appellee was allowed the benefit of the provisions, contained in the instrument of writing on which

he based his suit. It is equally clear that he is not one of the contracting parties in said instrument; a circumstance which renders it necessary to enquire whether, he be in any way subrogated to the rights, privileges and burthens of his vendor, as contained in the contract of the latter. In the deed of sale from Cheney to Grimball, no allusion whatever is made to the agreement, which the former had entered into with his neighbors, respecting the manner of running the division lines of their respective claims to land. On the instrument itself no assignment or transfer of right appears. But, in the absence of these express transfers, and consequent subrogation of the plaintiff, to the claims and obligations contained in the contract of the original parties, his counsel contends, that, being a covenant real, it does, *ipso facto*, by the sale and transfer of the land, in relation to which its stipulations are made, passes to the vendee. We have been unable, (in the authorities to which access could be had,) to find any thing satisfactory, on the subject of contracts, as distinguished into real and personal, applicable to the present case. The expressions, in the contract now under consideration, imply that it was to be

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extended beyond the immediate contracting parties. It is assignable. Its stipulation relates solely to real estate; and by the sale and transfer of any part of the land comprehended within said stipulations, to a third person in full right and dominion, it is believed subrogation ought to take place. Admitting the plaintiff to the benefit of this agreement, as *ayant cause*, we are of opinion that the construction given to it by the court below, and the judgment rendered on the whole evidence of the cause, are correct.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Wilson for the plaintiff, *Baldwin* for the defendant.

INNIS vs. *WARE.*

A trespasser cannot plead compensation nor reconvene.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff complains that the defendant tortiously took from him nine bales of cotton, weighing 3917 lbs. and appropriated them to his own use.

The defendant pleaded the general issue, and that if he did appropriate any cotton of the plaintiff to his own use, it was not to violate any property of the latter, but to raise $540 04 due him, (the items of which were stated in an account annexed to the answer;) that he tendered the balance to the plaintiff, notwithstanding he was a debtor of the defendant to a much greater amount, but he refused receiving it; that the plaintiff owes him a balance of $276 52, according to an account annexed to the answer; for which he prayed judgment.

There was judgment for $111 70, against the plaintiff, and he appealed.

The following facts were found by the jury, on issues submitted by the plaintiff.

The defendant took, and appropriated to his own use, the cotton of the plaintiff, as stated in the petition, and the net weight was as is therein mentioned.

This was on the 15th of January, 1823.

The highest price for cotton, in New-Orleans, after that time, was 14 1-2 cents per pound.

On the issues submitted by the defendant, the following facts were found.

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The plaintiff, at the institution of the suit, owed $503 44 to the defendant.

The cotton was appropriated by the defendant to the payment of his wages, as the plaintiff's overseer for 1822, after he had required the plaintiff to pay said wages, and he had refused.

The lowest price given, for cotton, in New-Orleans, after the appropriation, was 7 1-4 cents per pound; as much as 14 1-4 cents was afterwards given.

At the time of the taking, the cotton was worth 10 cents per pound.

The cotton was taken on the day the defendant surrendered the plaintiff's farm and hands, and his term of service expired.

On the trial the plaintiff objected to the defendant's availing himself of the plea of compensation or re-convention. The objection was over-ruled, and he took a bill of exceptions.

We think the court erred in over-ruling the objection. Trespassers cannot avert a judgment for damages resulting from the trespass, by compensation or re-convention—*Civ. Code*, 298, *art.* 91; *Cur. Phil. peremptories*, 8 & 9.

It is, therefore, ordered, adjudged and de-

creed, that the judgment of the district court be annulled, avoided and reversed, and as the jury have found every fact, material in the decision of the case, we think the case ought not to be remanded for the assessment of damages.

The taking is found; the quantity is also found to be that stated in the petition, viz: 3917 lbs. of clean cotton; the value is found to be 10 cents per pound; the cotton taken was accordingly worth, at the time and place of the trespass, $391 70.

The highest price given afterwards *in New-Orleans*, does not appear to us to afford a legitimate ground for decision. We might as well take the price in New-York, Liverpool, or Havre de Grace.

It is, therefore, ordered, adjudged and decreed, that the plaintiff do recover from the defendant, the sum of three hundred and ninety-one dollars and twenty cents with costs in both courts.

Scott for the plaintiff, *Thomas* for the defendant.

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APPEAL from the court of the sixth district.

The whole finding of a jury on special facts must be taken together.

Tortious acts by which no damage has been inflicted on others, do not authorise an action.

PORTER, J. delivered the opinion of the court. The petitioner states that he is the owner of a tract of land, situate in the parish of Rapides, and the improvements thereon, consisting of a dwelling house, kitchen, fences, &c. and that the defendant has illegally removed and carried off from the land these improvements.

The defendant pleads that he was justified in doing the acts complained of.

The cause was submitted to a jury on special facts. By the verdict it appears, the plaintiff is owner of the land on which the improvements were placed; that they were put there by the defendant, *bona fide*, at a time when he had reason to believe himself the proprietor of the ground on which they were erected, and that they have been taken off by him since he discovered he had no title to the premises, in consequence of a decision of this court. 12 *Martin*, 425. They further find that the buildings erected by the defendant were made of materials belonging to him.

The argument has principally turned on the

effect which ought to be given to other facts found by the jury: and in order that the opinion which we have formed should be fully understood, we shall state at length, the questions submitted, and the answers given.

The fourth question on the part of the plaintiff is as follows.

"What damage has the plaintiff sustained by the act of the defendant, independent of the value of the improvements he removed: in case the court should be of opinion, he was not authorised by law to remove the same, and that he was liable for damages independent of the value of the improvements?"

To this the jury replied—"The plaintiff has sustained no damage."

On the part of the defendant, the following interrogatory was submitted, "If the law is in favor of the plaintiff, how much damage has he suffered, and how much do you find against the defendant?"

To which they replied "We find no damage."

From the title exhibited by the plaintiff, it appears he recovered the tract of land on which the buildings, in question, were erected, in a suit where the defendant was not senten-

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ced to make restitution of the fruits. The first thing, therefore, necessary to be ascertained is, what are the rights of parties so circumstanced, in relation to improvements? On this point the legislature has provided, "that if the plantations, edifices, or works, have been made by a third person, evicted but not sentenced to make restitution of the fruits, because said person possessed, *bona fide*, the owner shall not have a right to demand the suppression of the said works, but he shall have his choice, either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil."—*Civil Code*, 104, *art.* 12.

Under this law, we think the defendant acted improperly; for, by his act, he deprived the plaintiff of his right to keep the edifices erected, and pay either for the value of the materials, or the increased value of the land. But in this, as in all other cases of the kind, there is another enquiry, besides that which goes to ascertain who has acted improperly: and that is who has suffered by the wrongful act, and what is the amount of the injury inflicted. The jury have said in answer to the fact submitted by the defendant, that if the law is with

the plaintiff, *he has sustained no damage.* A conclusion which, it is not remarkable, they came to; for if the party who keeps the works must pay *their value*, it is difficult to see how he could be much injured by their removal. It is indeed possible, that his land, in consequence of the buildings, may have been augmented in value more than they were worth. But if such had been the opinion of the jury, they could not have found negatively, that the plaintiff had not been injured. The plaintiff's counsel, has, with very commendable zeal, strenuously urged, that the finding of the jury on the fact submitted by him, entitles his client to judgment: because, in their answer, they impliedly admit he had a right to the value of the improvements, in declaring that he had suffered no damage *beyond* that value. But the whole verdict must be taken together, and so taken, there cannot be a doubt they intended to find, no damage had been sustained. The answer to the fovrth fact on the part of the defendant, is positive on this head. The verdict of the jury having found every thing in dispute between the parties, there is nothing left for this court to do, but to pronounce the law on the facts thus ascertained

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and settled: and our opinion is, that tortious acts, do not furnish ground for an action, when they occasion no damage to others.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Scott for the plaintiff, *Baldwin* for the defendant.

COX vs. *MULHOLLAN.*

The surety on an appeal bond is not relieved by the appellee obtaining a mortgage, reviving his judgment against the appellant's heirs, &c.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff states that he obtained a judgmeut against John M. Martin, now deceased; that the present defendant became surety for the appeal, which was not prosecuted; and that the judgment remains unsatisfied—wherefore he prayed judgment against the present defendant.

He pleaded the general issue, and that the plaintiff received a mortgage for his said debt, on a tract of land, which has since been sold as part of Martin's estate, for the common benefit of all his creditors, and particularly for

that of the plaintiff to the amount of his mortgage, and brought a much larger sum than the plaintiff's debt; that the plaintiff has revived his judgment against Martin's heirs.

There was judgment for the plaintiff and the defendant appealed.

The plaintiff introduced in evidence the record of the original suit against Martin, the appeal bond, and the certificate of the clerk of the supreme court, that the appeal was not prosecuted.

The defendant introduced the mortgage alluded to in the answer; the classification of the debts of Martin's estate by the court of probates; the process verbal of the sale of the property of the estate; the record of the suit of *Cox* vs. *Martin's heirs.*

The plaintiff has fully established his case, and the liability of the defendant. It is not contended that he has received payment, and that alone could extinguish his claim. Neither the mortgage nor the revival of the judgment against the heirs of the principal debtor can have this effect. The mortgage and the revival of judgment against the heirs, add to the security of the creditor, they do not diminish, in the least, the liability of the debtor.

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This case is hardly to be distinguished from that of *Baldwin* vs. *Gordon's heirs*, determined in this court in September last—12 *Martin*, 378. If the plaintiff has gained any advantage by the mortgage, revival of the suit, or the sale of the mortgaged premises, the defendant after paying, will consider whether he be entitled to a subrogation.

Ii is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Johnston for the plaintiff, *Thomas* for the defendant.

DEAN vs. *HUBBARD.*

If the defendant, after a motion to dismiss, proceed to trial, the motion to dismiss is thereby waved, and he cannot afterwards claim the benefit of it.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. This case was before us last September—12 *Martin*, 317. We reversed the judgment of the district court, dismissing the suit for want of an answer to the defendant's interrogatories; being of opinion that the latter, by going to trial, had waved his right to move for

a dismissal; and the case was remanded for trial.

The plaintiff had judgment, and the defendant builds his hopes of reversing the judgment on an assignment of error, viz: that the district court did not grant his waved motion to dismiss.

It is true, when a new trial is granted, the case is afterwards proceeded on as if no trial had taken place, but motions of the kind alluded to are, in their nature, pleas in abatements, and ought to be resorted to without delay; they are waved by any proceeding clearly evincing an intention not to resort to them; and when once waved they cannot be resumed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff, *Bullard* for the defendant.

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TURNBULL
vs.
DAVIS & AL.

TURNBULL vs. *DAVIS & AL.*

APPEAL from the court of the sixth district.

The want of publication of a judgmeet of separation does not render it *ipso facto* void.

MATTHEWS, J. delivered the opinion of the court. The sheriff having seized property as belonging to Walter Turnbull, by virtue of an execution in favor of the defendants, Mrs. Turnbull the wife of Walter, prayed an injunction against further proceedings on the levy thus made, and alleged in her petition that she is the true and legal owner of said property, under a sheriff's deed, which was sold to satisfy a judgment, rendered in her favor against her husband, for her paraphernal estate. The injunction was granted, and afterwards dissolved, on hearing the cause, and from the judgment or decision last rendered, the plaintiff appealed.

The evidence of the case shews, that Mrs. Turnbull instituted a suit against her husband for a separation of property, which was decreed, and also a judgment pronounced in her favor, for a large sum, on account of her paraphernal effects, upon which execution issued, was levied on the property of the husband, and at the sale she became purchaser thereof, and now holds it under a sheriff's deed. On the

part of the defendants, a judgment against Mr. Turnbull is there regularly recorded, anterior to that obtained by his wife, as above stated.

The principal grounds of defence relied on, against the claim of the plaintiff are, the want of publication of the separation of property obtained by the wife, as required by the *Civil Code, page* 342, *art.* 89; and the privilege acquired by an elder judgment, regularly recorded.

It is true, that by law, publication of a separation of property between husband and wife, *is* expressly required: but the pain of nullity is not denounced against a neglect of such publication. It is not a prohibitive regulation, which might, in some instances, imply nullity. We are therefore of opinion, that a judgment of separation, unattended by publication is not *ipso facto* void; but if such laches afford any ground for annulling and declaring it inefficient, it can only be decreed on shewing fraud and injury to third parties, as a consequence of omitting the publication. In the present case, there is no positive testimony that the defendants have suffered any injury, resulting from the neglect to publish the decree of sepa-

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ration: nor can such injury be legally presumed from the whole tenor of the evidence.

Being legally separated of property from her husband, the plaintiff had a right to enforce her claims against him. This she did, in the same proceeding, by which a separation was decreed, so far as to obtain a judgment for the amount of her paraphernal effects, which has in part been executed. But these proceedings are all subsequent to the rights acquired by the defendants, in consequence of their judicial mortgages, and therefore their counsel insists that the appellant's claim of privilege should be posponed to theirs. This would be correct if it depended solely on the judgments in favor of the parties, which is not the case, for the tacit or legal mortgage of the wife, commenced and took effect from the time at which her husband got possession of her property, which it is not denied was anterior to the judicial mortgage of the appellees.

The judgment against the husband, not being regularly opposed by intervention of the defendant, in the suit for separation, and as there is no suggestion or proof of fraud or collusion, is good evidence of the amount due to the wife, on account of her paraphernal effects.

In support of this principle, see 6 *Martin*, 14.

We are of opinion that the judgment of the district court is erroneous.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the injunction heretofore granted by said court, be reinstated in all its force; and that the same be made perpetual; and that the appellees pay costs in both courts.

Oakley for the plaintiff.

HYNSON & AL. vs. *MADDENS & AL.*

APPEAL from the court of the sixth district.

Interest is to be calculated from the maturity of the note, till the day of a partial payment, and added to the principal: the partial payment is then to be deducted from the aggregate.

MARTIN, J. delivered the opinion of the court. Error is assigned in the mode of calculating interest.

The suit is on a note for $400, payable in all January, 1822, with interest at 10 per cent. thereafter, if not punctually paid. No payment was made till the 1st of July following, when $74 57 were credited. The judgment is for $340 10, with interest at 10 per

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cent, from the 1st of July, 1822, the day of the partial payment.

The district court arrived at this result, by calculating the interest from the maturity of the note till the day of the partial payment, adding this interest to the principal and deducting the payment.

This appears to us the most correct way—that which has the greatest tendency to induce debtors to make payment. We have an express provision for it, in our statute—*Civil Code*, 290, *art.* 154. It was the principle of the Roman law—*Prius in usuris, reliquum in sortem. ff. de fid. & mand. l.* 68.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs; and that the defendants and appellees pay 10 per cent. damages for the unjust appeal.

Oakley for the plaintiffs, *Baldwin* for the defendants.

MUNSON vs. *CAGE.*

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MUNSON
vs.
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APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The appeal in this case was made returnable to the term of 1821, and was filed in this court, on the 8th of September, of the present year. The statute has positively directed that the record shall be returned on the day fixed by the judge, granting the appeal; and that direction not having been pursued, we must dismiss it—See the cases of *Carpentier* vs. *Harrod*, 11 *Martin*, 434; *Howe* vs. *Montgomery*, 12 *ibid.* 505; and *Lafon's ex'r.* vs. *Rivierecs*, *ibid*, 506.

The appeal is to be dismissed, if the record be not filed on the return day.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs.

Baldwin for the plaintiff, *Thomas* for the defendant.

OFFUT'S HEIRS vs. *ROBERTS.*

APPEAL from the court of the sixth district.

The appeal is to be dismissed, if the record be not filed on the return day.

PORTER, J. delivered the opinion of the court. The appeal was granted, returnable on the 1st day of September term, 1822, and it

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has been filed on the first day of the present term. In a case, similarly circumstanced, we have just decided, under the provisions of the act, regulating the mode of bringing up causes to the court, that the appeal ought to be dismissed—this requires the same judgment—2 *Martin's Digest*, 442, *no.* 6.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs.

Baldwin for the plaintiffs, *Thomas* for the defendant.

CAMPBELL vs. *ARMSTRONG.*

If a slave be wrongfully detained, wages will be allowed from the date of the citation.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff stated himself to have been possessed, as owner, of two slaves, whom the defendant wrongfully possessed himself of, and unjustly detains. He prayed for the restitution of them, and damages.

The defendant pleaded the general issue.

There was a verdict and judgment in favor of the plaintiff, for the restitution of the slaves, but no damages were given, neither did the

jury say any thing as to these in the verdict. The plaintiff appealed.

This case differs but little from that of *Campbell* vs. *Miller*—*Ante*, 514. The facts however, are found against the defendant, and he did not appeal. The plaintiff having established the tortious detention of his slaves, was certainly entitled to their hire. It ought to have been allowed him from the service of the citation It is sworn they are worth $10 per month for each slave.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the plaintiff do recover the slaves, Edward and Mamdee, and the sum of three hundred and forty-nine dollars thirty-three cents for their services, with costs in both courts.

Oakley and *Thomas* for the plaintiff, *Baldwin* for the defendant.

MULHOLLAN vs. *M'CRUMMEN.*

APPEAL from the court of the sixth district.

If the appellant neglect to bring up the record, and the judgment be affirmed damages will be given.

MARTIN, J. delivered the opinion of the court. The plaintiff and appellee has brought

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up the record, the defendant and appellant having neglected doing so. It appears there is no statement of facts, &c. so that we cannot inquire into the merits of the case—no error is assigned. We conclude the appellant had nothing in view but delay.

It is therefore ordered, adjudged and decreed, that the judgment be affirmed; and that the plaintiff recover 10 per cent. damages, on the judgment, with costs in both courts.

Oakley for the plaintiff, *Scott* for the defendant.

ROGERS & AL. vs. *M'CRUMMEN.*

A like judgment as in the preceding case.

Baldwin for the plaintiffs, *Oakley* for the defendant.

MOLLAN & AL. vs. *M'CRUMMEN.*

A like judgment as in the preceding case.

Baldwin for the plaintiffs, *Oakley* for the defendant.

CRANE & AL. vs. *MARSHAL.*

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The district court has jurisdiction of a suit where the heirs at law claim the whole estate from a person they allege has no title to it.

The defendant cannot attack the title under which he claims.

Where a will is witnessed at intervals of time and there are alterations made in the testament between the first and last attestation, it is void.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The plaintiffs state that they are heirs at law of the late Susanna B. Marshal, that she died in the parish of Rapides, leaving a large property to which they are entitled; but that the defendant, setting up a title under a will, executed by the said Susanna, has taken possession of all her estate and refuses to deliver it up.

The defendant pleads title in virtue of the will referred to in the petition, and avers that he has always been ready to give up to one of the daughters of Crane, two slaves, to whom she is entitled as legatee under the testament.

The first objection made to the plaintiffs' right of recovery in this action is, that the district court had not jurisdiction; that it belonged exclusively to the court of probates.

We are of opinion that this objection is not well taken. The act establishing the district court gives it power to try all civil cases originating in the parish where it sits, and this is one of that description. The act of the legislature to which we are referred, if it give to

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the court of probates jurisdiction of a case of this kind, does not confer it exclusively—*Acts of* 1820, 92.

The case of *Vignaud* vs. *Tonnacourt*, 12 *Martin*, 229, was decided on the provisions of the Civil Code, enacted anterior to the establishment of our present judiciary system, and from a conviction that it was a matter of necessity that one tribunal should determine, and classify the claims, which a vacant estate or one accepted with the benefit of an inventory might owe.

The second objection is, that the defendant has shown an outstanding title in a third party. This we think he cannot do, as he claims under the same person as the plaintiffs. To suffer it would be permitting him to contradict his own admission. The question at issue on the pleadings was—who had the best title under Susanna Marshall, not whether she had a good title.

The will is clearly defective. It was not attested by the witnesses at one time; some of them affixed their names to it at night, and some the succeeding day. Between the period when the first and the last signed, alterations were made in the instrument; so that

there were not five witnesses to the *last will.* It was not *presented* by the testatrix to two of the witnesses, nor was there any thing passed between her and them, which was equivalent to a presentation—*Civ Code*, 228, *art.* 96; *Bouthenry* vs. *Dreux*, 12 *Martin*, 639.

It is therefore ordered, adjudged and decreed that the judgment of the district court, be affirmed with costs.

Thomas and *Wilson* for the plaintiffs, *Scott* and *Baldwin* for the defendant.

MULHOLLAN vs. *JOHNSON.*

A defendant who appears not to have been ignorant of his want of title, may be decreed to pay wages, even before the demand.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff states that he is the owner, and as such was possessed of a negro woman and her four children; whom he bought at the sale of the estate of the late M. Martin, and the defendant has taken and refuses to deliver them back.

The defendant pleaded the general issue, and that the late G. B. Curtis, whose executor he is, was at his death, in quiet and peaceable possession of said slaves, as owner, having pur-

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chased them at the sale of the estate of the late J. M. Martin, through the plaintiff's agency. He prayed the plaintiff might be decreed to convey them to him, and to be quieted in his possession, and have his costs, &c.

There was judgment for the plaintiff and the defendant appealed.

The statement of facts shew that,

The plaintiff introduced the process verbal of the sale.

R. Martin deposed, that the plaintiff has paid him the price of the slaves. Two of them are worth $12 per month, each. They were received by Curtis a few days after the sale, and have remained in his possession ever since. Curtis had a claim against Martin's estate, and it was agreed that whatever might come to him, after the classification, would be taken in payment of the negroes. Curtis was ever anxious to give up the negroes to the plaintiff, if he would satisfy the conditions of the sale. The witness, as agent of the estate, was paid by the plaintiff. He would not have received Curtis' claim, at one third of its amount, in consequence of the insolvency of the estate.

The parish judge deposed, Curtis bid off

the negroes, but they were by his direction, entered on the process verbal, as the purchase of the plaintiff. At this time Curtis was about making a conveyance of all his negroes to the plaintiff. He was applied to, on that day, to make it, and it was made; but whether on that or a subsequent day, he cannot tell. He understood from the plaintiff, the negroes were not paid for by Curtis, but that the plaintiff would have to pay for them—that they were purchased by Curtis, but the plaintiff would have to keep and pay for them. The plaintiff expressed his wish that the defendant, as executor of Curtis, would pay for and keep them, and the latter failing so to do, the plaintiff paid for them. This was understood from him.

It was admitted, that after the sale, the slaves were received by Curtis, and ever after kept by him.

Muncey deposed, that at the sale of Martin's estate, a family of negroes were put up, whom he believes to be those claimed, and he understood, he believes, from a conversation between Curtis and the plaintiff, that the latter being unwilling to be surety, Curtis desired that the plaintiff might be set down as purcha-

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ser, and he (Curtis) as surety. Curtis said he had a claim against the estate, and wished to have something to hold on; it might be a long time settling. Of all the facts, except the last, he has but a very imperfect idea or recollection.

The plaintiff has shewn a clear, legal title, and proved the payment of the price; the defendant has certainly no equitable one. He has only the naked possession. This appears to be an attempt to compel the plaintiff to stand as surety in a contract, in which he positively refused to enter, except as a principal.

It is urged that the court erred in allowing the plaintiff wages before the legal demand. It is true the defendant was not, till then, a tortious or dishonest possessor; but the testator, when he received these slaves, knew they were not his own, and that he could not apply to his own use, the profits of their labor, without enriching himself to the injury of another, unless he made them his own, by complying with the contract. His estate is, consequently, chargeable.

It is therefore ordered, adjudged and de-

creed, that the judgment be affirmed with costs.

Thomas for the plaintiff, *Johnston* for the defendant.

CURTIS vs. *GRAHAM.*

APPEAL from the court of the sixth district.

When a cause is remanded, the plaintiff may restrict his claim by a supplemental petition.

MARTIN, J. delivered the opinion of the court. This case was remanded from this court, at last September term—12 *Martin*, 380. On the return of it, the plaintiff filed a supplemental petition, stating that she originally had claimed the recovery of a certain house and improvements, of which the defendant had wrongfully possessed himself. She now claimed $3000, the value of the improvements, on the promise of the defendant, that if she would give up the premises he would pay the value of said improvements; alleging that she had given up part of the premises, viz: the kitchen, &c.; and the defendant had taken possession of the rest; and she averred the improvements to be worth $3000.

The defendant pleaded the general issue, and denied the plaintiff's right to recover on

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her own statement. There was a verdict against him for $500, and he appealed.

The quantum of damages found by the jury does not appear to us to exceed the value of the improvements, and although her first petition was for the recovery of the premises, we believe, she may well, by the supplemental one, have restricted her claims to the damages which the defendant agreed to pay, viz: the value of the improvements. She avers she gave up part of the premises, and the defendant took possession of the rest. His possession of the whole is proven, and rendered it useless that the plaintiff should give up what was already in the defendant's possession.

It is therefore ordered, adjudged and decreed, that the judgment be affirmed with costs.

Thomas for the plaintiff, *Baldwin* for the defendant.

MARTIN'S HEIRS vs. *OVERTON.*

An assignee or endorsee, must suffer compensation of what he owes in his own right.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim the rent of a tract

of land rented, and the price of two mules, a stock of cattle, &c. sold by their ancestor to the defendant.

He pleaded the general issue and compensation. They had judgment for $633, and he appealed.

Turnbull deposed, he rented land from the plaintiffs' ancestor: he does not know how much. He himself rented some part of it from the defendant, at from 4 to $5 per acre.

Mulhollan deposed the land rented was surveyed, and he believes there were 95 acres. Land rented well that year, he believes from 5 to $6 per acre. The defendant had two mules from the plaintiffs' ancestor, they were worth $150. He got all the cattle, bought by the plaintiffs' ancestor from Pannell. He saw them drove, but does not know how many there were.

Curtnod was present at this purchase; the defendant was to pay what the cattle cost at Pannell's sale. He thinks from 4 to $500 dollars. He thinks there were 95 acres in the field spoken of by Mulhollan.

Coneso deposed, the land in 1819 rented for $5 an acre. Martin gave $400, and there were 91 acres.

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The plaintiffs introduced the classification of their ancestor's debts.

The defendant offered sundry notes of the plaintiffs' ancestor, and of R. Martin, one of the plaintiffs.

We are of opinion that the plaintiffs have established a claim to the rent of 95 acres of land, at $5 00 a year—*i. e.* $475; the price of two mules $150; and the price of the cattle $400; the only certain sum sworn to, in all $1025. There are four plaintiffs; the share of each is $256 25 cents.

A note of R. Martin, one of the plaintiffs, for $127, is offered in compensation of his claim. It ought to be allowed, as he does not allege he sues as a beneficiary heir, and we cannot assume this fact from the classification; but without interest, as it was given after the debt, claimed by the plaintiffs, accrued.

Robert Martin is a claimant in *his own right*, although he claims as heir—*i. e.* the sum (if any) will be his own absolute property, although his claim results from a debt *originally* created by his ancestor; for as the amount will be exclusively and absolutely his own, any debt due *by him* may be set off. In the same manner that a plaintiff, who sues as as-

signee or endorsee, though he claims what was once due to his assignor or endorser, is bound to suffer the compensation of what he owes, on contracts entered with him.

A note of the plaintiffs' ancestor for $221 34, is to be allowed in compensation by all the heirs for their respective shares, as it reduces their ancestor's claim. It bears interest from a day anterior to its date, and this we have allowed up to the last day of the year 1819, when the rent became due, $16 59, which, added to the amount of the note, is $237 93.

One fourth of this sum, $59 43, is to be borne by R. Martin. This, with the amount of his own note, reduces his claim to $69 82.

Two notes, in which he and his ancestor are jointly bound, are next offered and the defendant claims to set off as much of their joint amount, as will cover the balance due to Robert, and this he has a right to do; so that Robert's claim is extinguished.

No interest is to be allowed on this note, as it became due after the plaintiffs' claim attached, and it extinguished it—*de jure pro tanto.*

The three fourths, due to the other heirs by the defendant, amount to $768 65. The de-

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fendant has a right to compensation against this, for three-fourths of their ancestor's note; and $53 18 the balance due on the two notes, in which he was bound jointly with R. Martin, which leaves a balance to be divided among them, of $737 67.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and proceeding to give such a judgment, as in our opinion, ought to have been given below, it is ordered, adjudged and decreed, that the plaintiffs, William, Elizabeth and Anne, recover, from the defendant the sum of five hundred and thirty-seven dollars and seven cents, with costs in the district court; and that there be judgment against the plaintiff Robert, and he pay the costs of the appeal.

Thomas for the plaintiffs, *Bullard* for the defendant.

DAVIS vs. *DANCY & AL.*

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APPEAL from the court of the seventh district.

If it appear all the evidence was not taken down by the clerk, the court will remand the cause, altho' the knowledge of the defect reaches it irregularly.

PORTER, J. delivered the opinion of the court. At the last term of this court, for this district, the defendants and appellants moved for a *certiorari*, in order that certain documents, which were made a part of the original petition, and used on the trial below, should be sent up to complete the statement of facts. This order was granted, and the judge in making a return to it, gives us a history of the trial, and states, as a reason why the plaintiff was permitted to withdraw documents which he had made a part of his petition, that the parties in open court, and before the cause was gone through, agreed to make out a statement of facts, and directed the clerk to cease taking down the testimony. That the trial was had on the 23d of February, 1823, and the judgment signed on the 27th; and no application being made for this statement to be recorded, he had conceived the appeal abandoned, and gave permission to the plaintiff, to withdraw the title papers he had annexed to his petition.

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In addition to this certificate, the judge for *greater certainty*, (as he states,) refers us to that of the clerk, and that officer certifies that the several documents annexed to his return were the same read in evidence on the trial, "that other documentary testimony, read in evidence to the court and jury, was by consent of counsel to have been supplied by a statement of facts: and that he continued to take down in writing the testimony offered in the cause, until otherwise directed by the court and counsel."

Before entering on the question which has been raised on this return, it is necessary to state, that the record when filed in this court, was neither certified by the judge to contain all the matters on which the cause was decided: nor by the clerk that he had taken down all the evidence. It did, however, appear that the clerk had reduced to writing oral testimony, pursuant to the act of 1817, and we held as we had often done before, that the legal presumption was, that he had taken down *all* that was given on the trial, and that the record was before us in such a shape, as authorised an examination of the case on its merits.

It is now objected, that however correct and

legal this *presumption* may be, it ceases the moment the officer who made out the record, declares that it is incomplete; and that the court cannot presume the whole evidence was taken down in direct opposition to the certificate of the clerk that it was not taken down. To this it is replied, that the transcript when returned here, was such as the court could legally have acted on, and tried the case on its merits. That a record, which was then good, cannot now be destroyed, by a judge doing that which he was not authorised to do:—namely, certifying what transpired in court during the trial: nor by a certificate of a clerk, volunteered, on matters which he was not called on to explain, and made from memory, months after the cause was investigated.

How much of the oral evidence is wanting, and what effect it would have on the cause, if now before us, we do not know. The probability of its being material is greatly weakened by the plaintiff's not objecting to the record, when he appeared to answer the appeal. But then we do not know but it may be material, and although the information of its having been given, comes to us in an irregular way, and one which could not have been noticed, if the

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record had been positively certified in the first instance, we do not feel at liberty entirely to disregard it. This case is peculiarly circumstanced, and appears to be one for the exercise of those discretionary powers, which the law has invested us with, to promote the ends of justice. To examine it as it now stands, or to dismiss it, might work an irreparable injury to one or other of the parties. The safest course is to remand the cause for a new trial; this disposition of it may occasion delay, but will not work injustice.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that this case be remanded for a new trial, and that the appellees pay the costs of the appeal.

Wilson for the plaintiff, *Thomas* for the defendants.

WELLS vs. *DILL.*

If one of the parties to a contract refuse to sign, it is not binding on others who have already affixed their signatures.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The defendant is sued on the ground that he signed, as surety, an instrument pur-

porting to be a bond given by Charles R. Blanchard, for his faithful performance of the duties of curator, to the vacant estate of one Jared Rison, deceased.

In opposition to this action the defendant relies principally, on the want of the signature of another person, to the instrument, whose name is mentioned in the body of it, as co-surety.

The bond is drawn in the name of Charles R. Blanchard, as principal, and the defendant and Walter Turnbull as sureties. At the bottom the names of Blanchard and Dill are affixed; that of Turnbull is wanting.

We agree with the defendant that, under these circumstances, his signature to the obligation does not bind him. The contract is incomplete until all the parties contemplated to join in its execution affix their names to it: and while in this state cannot be enforced against any one of them. The law presumes, that the party signing, did so, upon the condition that the other obligors named in the instrument should also sign it: and their failure to comply with their agreement gives him a right to retract. The authority of Pothier is

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express on this head—*Pothier, traite des obligations, no* 11. See, also, 4 *Cranch*, 219.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed, avoided and annulled; and that there be judgment for the defendant with costs in both courts.

Johnston for the plaintiff, *Baldwin* for the defendant.

WOOD & AL. vs. *LEWIS.*

The judge's certificate cannot control or eke out the facts appearing on the record.

MARTIN, J. delivered the opinion of the court. The plaintiffs and appellees pray that the appeal be dismissed, because there is no statement of facts, bill of exceptions, &c. on which the judgment may be examined.

The clerk of the district court has certified that the transcript which comes up, is a correct one "of all the proceedings in the cause, and of all the documents on file, in the same." His certificate bears date of August 5, 1822. On the 28th of the same month, he certified that there was on file, a certificate, granted on the 26th, by the district judge, at the request of the appellant's counsel, in the following

words:—"I certify that there was a judgment by default in the above case, and that it became final, without any other evidence produced than is contained on the record, to the best of my recollection. I am certain there was no written evidence given, and I believe the record to contain all the evidence on which the above suit is decided."

The record shews that judgment was given on the 21st of December, 1821, that the plaintiff recover, and be quieted in the possession of the slave mentioned in the petition. No document; no evidence, parol or written, is mentioned. It is to be feared that the recollection of the judge does not enable him, twenty odd months after he rendered the judgment, to give us a correct statement of the proceedings which preceded it. We must believe that, if there had been a judgment by default, the clerk would have recorded it. An answer appears to have been filed several days before the date of the judgment.

Even if the judge's certificate had been granted, soon after the judgment, it would not afford us a legitimate ground of proceeding, as the record contains no document.

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The appeal must be dismissed with costs.

Mills for the plaintiff, *Rost* for the defendant.

VACOUNE vs. *POLICE JURY.*

No one can appeal from the decision of a police jury, for laying out a road; but the owner of part of the land over which it passes.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. Vacoune appealed from a decision of the police jury of Natchitoches, in laying a road, which he alleges is injurious to his interest. He does not pretend to be the owner of any part of the land over which the road complained of passes, and it is to such owner only, to whom the right of appeal from such a decision is given. *Act of assembly, approved March* 12, 1818, *sec.* 2, *page* 54.

The district court was, therefore, correct in decreeing that the appellant take nothing by his application and pay costs.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Rost for the plaintiff, *Bullard* for the defendants.

APPEAL from the court of the sixth district.

No appeal lies from the continuance of a cause.

MARTIN, J. delivered the opinion of the court. The defendant, sued on a note given originally to the plaintiffs' endorser, obtained the district court's order that the maker of the note answer certain interrogatories, put by the defendant to him, in the answer. The plaintiffs excepted to the opinion of the court ordering the answer, and took a bill of exceptions.

The cause was continued twice, in order to obtain the answer, on the motion of the defendant. The plaintiffs appealed from the decision of the district court, in granting the continuance.

It is urged that the grant of the continuance works an irreparable injury to the plaintiffs, and their counsel urges, that the district court erred in granting the order to answer the interrogotaries.

As the propriety of granting the order to answer, may probably be made an object of inquiry, when this cause after final judgment, may be regularly brought up, we refrain from expressing any opinion on it.

The appeal appears to us to have been pre-

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maturely taken. No final judgment has as yet been obtained, and we are bound to believe that at the next term the district court will do its duty. No argument, bottomed on the presumption that it will not, can have much force.

The district court erred in granting an appeal, and it must be dismissed at the appellant's costs.

Wilson for the plaintiffs, *Thomas* for the defendant.

BALDWIN vs. *TAYLOR.*

Damages given for a frivolous appeal.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This case has been brought up by the appellee, who requires that the judgment should be affirmed with damages. An inspection of the record convinces us that it was taken solely for the purpose of delay.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with ten per centum damages for the delay.

Baldwin for the plaintiff, *Johnston* for the defendant.

HILL vs. *TUZZINE.*

APPEAL from the court of the sixth district.

The appellant cannot assign any thing, as an error apparent on the record, which might have been cured by legal evidence.

PORTER, J. delivered the opinion of the court. The defendant has appealed, and assigns as errors, appearing on the face of the record, matters which could have been cured by evidence legally introduced on the trial, without his consent. The presumption is they were introduced, and this is so clearly the case that the appellant must be considered to have taken the appeal for the sole purpose of delay.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs and damages at ten per centum, on said judgment, for the delay.

Rost for the plaintiff, *Deshlieux* for the defendant.

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LANDREAUX
vs.
HAZLETON.

LANDREAUX vs. *HAZLETON.*

If the property of the debtor be covered by special mortgages and privileges, the sheriff may seize and sell as much as will satisfy the execution over and above the amount of the liens.

APPEAL from the court of the sixth district.

PORTER J. delivered the opinion of the court. The plaintiff demands five thousand dollars from the defendant, sheriff of Natchitoches, for having illegally, oppressively, and under color of his office, made a seizure of slaves and other property belonging to the plaintiff.

The defendant pleads, that writs of *fieri facias* were placed in his hands at the suit of certain persons: that the seizures he made under them are the acts complained of: that he acted in good faith: and that two days after he took the property into his possession, writs of seizure and sale were delivered to him at the suit of Rochelle & Shiff, on a mortgage which the plaintiff had given on the slaves seized.

The evidence given on the trial shews, that the amount which the defendant had to collect under the writs placed in his hands was $1,604 96: that the amount of property seized by him was $15,600, but that there were mortgages on it, amounting to the sum of $11,210; so that the balance unincumbered

was $2390, according to the estimation made pursuant to law.

The oral evidence is short, and not of much importance. It proves the seizure to have been made, under the circumstances which usually attend transactions of this kind: that the sheriff strictly pursued the law by taking with him two freeholders, who appraised the property before he seized it: that he took the property into his possession as by law he is commanded to do, and that he told the defendant, if he would give him security for the forthcoming of the property on the day of sale, he would leave it in his hands.

A bill of exceptions was taken to the opinion of the judge in his charge to the jury. The point on which he expressed that opinion goes to the whole merits of the case, so that an examination of the principles on which the action is sought to be maintained, will necessarily embrace this charge, and render a more particular notice of it unnecessary.

The question presented for decision, as was said from the bar, is one of considerable importance, but of little or no difficulty. It is whether a sheriff who finds a defendant's property incumbered with general or special

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mortgages can take the whole of it, or at least a sufficient part to satisfy the execution in his hands, over and above the liens by which it is affected; or whether he is not compelled to seize an amount equal to that expressed in the writ, without noticing the mortgages.

The mortgage is a real right on the immoveable affected by it: it is in its nature indivisible: it subsists for the whole on all and each of the things affected by it, and on every part of them—*Civil Code*, 452, *art.* 3.

Consequently, then, any object he might have seized, was covered by mortgages to the amount of $11,210, and had he seized only the amount of the executions in his hands, he would have been doing a very unnecessary act; for it cannot be presumed that any one would have purchased property subject to mortgage five times its value. Had he found a purchaser, he could not have forced him to make payment, for the law says where there exist mortgages the sheriff shall only receive the surplus. There would, however, have been no surplus here, so that the sale would have been useless to the plaintiff, oppressive to the defendant, and tended to no other pur-

pose than to have shewn the insufficiency of the law—*Acts of* 1817, *sec.* 17, *p.* 38.

The argument, which this statute offers against the plaintiff's pretensions, will be rendered still stronger by referring to it more particularly. Its words are "that whenever any special mortgage or privilege exists on the property offered for sale, in favor of any other person than the creditor seizing, it shall be sold, subject to the payment of such special mortgage or privilege by the purchaser; and the sheriff or other public officer, making the sale, shall only receive the surplus." This enactment necessarily recognizes the right of the sheriff to seize property to a greater amount than that mentioned in the execution: for it points out he is to sell it, and that he is only to receive the surplus. This is what the officer has done here: and it is difficult for us to see how an act, which the legislature has sanctioned so plainly, could have been thought of, as furnishing ground for an action of damages.

It is said the sheriff had no right to notice mortgages except on the day of sale. His duty was to act under the law in such a way, as to give effect if possible to the execution in his

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hands. In doing so he had as much right to notice mortgages, on the property he was about to seize, as he had a right to notice that an object surrendered to him by the debtor was not his property: a right which we never heard contested. The act of the legislature, which makes it the duty of the officer selling to produce the certificate of the register of mortgages on the day of sale, is made for the information and benefit of persons inclined to purchase, and has no relation whatever to the exercise of that discretion, which the law has vested in the sheriff.

It has been contended, he seized without notice. The statute does not require it, unless the judgments were by default, and the writs produced on the trial shew no such endorsement—*Acts* 1817, 34, *sec.* 14.

Arguments *ab inconvenienti* have been pressed on us, but where the law is clear they have little weight. We think, however, the inconveniencies are on the other side, and that the principles for which the plaintiff contends would render it impossible to make the money by a forced sale from a debtor situated as the plaintiff was. If men will leave nothing but

mortgaged property to satisfy their creditors, they must bear with the consequences.

The office of sheriff is one of great importance to the community. It calls for the discharge of duties difficult and delicate, and the law looks on such officers with tenderness, so long as they act in good faith. They are responsible to be sure for oppression, or for illegal conduct; but neither have been proved here, and we are satisfied this action cannot be maintained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendant with costs in both courts.

Johnston and *Thomas* for the plaintiff, *Bullard* and *Rost* for the defendant.

HERRIMAN vs. *MULHOLLAN*.

APPEAL from the court of the sixth district.

The vendee cannot withhold the price, on the ground that part of the land sold, belonged to a minor, and the le-

PORTER, J. delivered the opinion of the court. The plaintiff, as endorsee, sues on two promissory notes, executed by the defendant,

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and made payable to a certain Susanna Spencer.

The defendant pleads want of consideration and payment.

The evidence shews that one of these notes was endorsed to, and received by the plaintiff, after it became due, consequently he took it liable to all the equities to which it would have been subject in the hands of the original parties, because the very circumstance of its not being paid at the time promised, was sufficient to put him on his guard, and suggest to him the necessity of making enquiries.

gal formalities were not complied with.

The endorsee of a note, after maturity, must allow as a set off, existing claims against his endorser.

The want of consideration pleaded, in the answer, has not been sustained by the proof. No evidence is given that the defendant has been troubled in his possession, nor evicted of the land he purchased; nor does the fact, that part of the property belonged to a minor, and was sold without the solemnities of law, furnish a good ground for withholding payment. This question has already been settled in the case of *Melancton's heirs* vs. *Duhamel*, 10 *Martin*.

It has been proved that the maker of these notes, at the time of the transfer, had claims against the payee, for which he thinks he is entitled to a credit against the plaintiff, who, as

to one of the notes, stands in the same situation as the payee would.

These claims, according to the evidence appear to be as follows:

The rent of the land, (80 acres,) at 5 dollars per acre,	$400
Rent of a house for one year, at 12 dollars per month,	144
Judgment recovered at the suit of La Tiernan, against the defendant as garnishee, *with interest*,	120
Amount,	$664

From which must be deducted the hire of negroes. The witness says three or four were hired; that they were worth 12 dollars a month, and that he is certain two of them remained for a year. Allowing three for that time it appears to us that the just medium will make a sum of four hundred and thirty-two dollars, which deducted from six hundred and sixty-four, will leave a balance of two hundred and thirty-two dollars, for which the defendant is entitled to a credit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, reversed and avoided; and it is

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further ordered, adjudged and decreed, that the plaintiff do recover of the defendant the sum of eleven hundred and sixty-eight dollars, with interest on 468 dollars of that sum, at ten per cent. from the 31st of May, 1821, until paid, and interest on the remainder, that is to say, on 700 dollars, from the 31st of May, 1822, at ten per cent. and costs in the court below; and that the appellees pay the costs in this court.

Johnston for the plaintiff, *Thomas* for the defendant.

CLAY vs. *BYNUM.*

A power to sign the constituent's name, in any transaction, in which the attorney may deem it necessary and proper, does authorise the endorsement of a note.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. In this case, the defendant is sued as endorser on a negotiable note, which appears to have been endorsed by his attorney in fact. He refuses payment on the ground of the attorney having exceeded his power, and consequently the constituent is not bound by the act of the former. In the court below there was judgment for the plaintiff, from which the defendant appealed.

The record contains evidence, which seems to have been intended to shew a ratification on the part of the appellant, subsequent to the endorsement by the act of his attorney. But, as it is believed that the appellee has failed to establish that fact, we have only to examine the cause in relation to the procuration under which the attorney acted. It is general for all purposes, and also contains clauses giving special authority to act in many cases, amongst which is that of signing the name of his constituent in any transaction in which he might deem it necessary and proper. This latter clause, (if any can do it,) is that which must give the power, assumed by the agent, in making the endorsement above stated.

A power conceived in general terms, or procuration *omnium bonorum*, does not authorise the attorney to contract debts for the principal, unless such as may be necessary for the conservation of the property in his charge. In no case can he stipulate, so as to bind the latter to his injury, unless specially authorised to the act which may result in injury. He cannot bind the constituent as surety; can make no donation, &c. We are of opinion that the authority given to the attorney in the present

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case to sign the name of his principal, ought not to extend to contracts, which from their nature create any new debt or obligation on the latter. It might possibly have reached the renewal of notes, in which he was already bound, but the one which forms the basis of the present action is not shewn to be of that sort.

Being of opinion that the attorney had not authority to bind his constituent, by endorsing notes which would create an original obligation, we conclude that in the case now under consideration, the former has exceeded his authority, and that, consequently the latter has not contracted through him any obligation by the endorsement.

It is therefore, ordered, adjudged and decreed, that the judgment of the court below be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that judgment be given for the defendant and appellant with costs in both courts.

Thomas for the plaintiff, *Wilson* for the defendant.

TURNBULL vs. *CEBRA & AL.*

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TURNBULL
vs.
CEBRA & AL.

The authorisation of the husband does not necessarily result from the signature of the latter, to the act in which the wife relinquishes her tacit mortgage, when he himself enters into a covenant by the same act.

She must expressly mention the law the benefit of which she renounces.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This case differs in nothing from that of *Turnbull* vs. *Davis & al.* just now decided, except a renunciation in favor of the appellees of the tacit or legal mortgage of the appellant on the slave which was seized in execution.

We must, therefore, enquire into the validity of said renunciation. It is done by authentic act, in which the husband appeared and signed with his wife. The act was passed before Thomas C. Scott, parish judge of the parish of Rapides, but in this instance he must be considered as acting in his capacity of notary public, as the instrument has no resemblance to a judicial proceeding. A wife cannot alienate her paraphernal effects, or appear in a court of justice concerning them, without the authorisation of her husband; or on his refusal to give it, that of the judge—*Civil Code*, 334, *art.* 68. *Ante*, 568.

In cases, where the wife may legally act under authority from her husband; such authorisation may be finally presumed from the circumstance of his signature appearing to the

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same instrument by which the wife binds herself. But in those cases, it is the act of the wife sanctioned by the husband. In the present, the husband and wife both appear before the notary; make separate and distinct stipulations in their individual capacities: One promises to deliver a crop of cotton to the obligors in the contract; the other to remove or relinquish her tacit or legal mortgage on certain slaves specified in the act: the signature of the former may be considered solely in relation to his own promise, not in any manner affecting the account of his wife, and consequently no evidence of authorisation on his part. This view of the subject is taken as if the case presented a sale or other alienation by the wife, of her own property: but in reality it is different. It is an act by which she renounces certain privileges, accorded to women by law, to protect them against the folly and extravagance of their husbands.

The rights which she relinquishes, may be considered as latent; recoguized, it is is true, by law, but not supposed to be completely within the knowledge of the proprietor; as is evidenced by the strict formalities under which such instruments are to be made, and the infor-

mation required to be given by notaries who reduce them to writing. See, in support of this doctrine, 6 *Martin*, 577; wherein it appears that the renunciation of a wife to her tacit mortgage, must express the laws, the benefit of which she renounces; which is not done in the present case In addition to this objection to the validity of the appellant's obligation, it is difficult to discover any consideration, which did or could result to her advantage. Upon the whole, we think the act void and of no effect, in relation to Mrs. Turnbull.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, reversed and avoided; and it is further ordered, adjddged and decreed, that the injunction, heretofore granted by said court, be re-instated in all its force; and that the same be made perpetual; and that the appellees pay costs in both courts.

Oakley for the plaintiff.

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PANNIL
vs.
COE & AL.

PANNELL vs. *COE & AL.*

APPEAL from the court of the sixth district.

If the copy of a private deed be received in evidence, its effect will be the same as the original.

A payment, though of more than five hundred dollars, can be proved by a single witness.

MATHEWS, J. delivered the opinion of the court. This case was brought up to the last term of this court, and being then remanded for a new trial, which has since taken place in the court below, and final judgment thereon rendered; an appeal is again taken by the plaintiff.

The proceedings in the cause commenced before the court of probates for the parish of Natchitoches, and relate to a claim of the present appellant for remuneration, as a privileged creditor, on her husband's estate, to the amount of her paraphernal effects, disposed of by him during the marriage; in which she succeeded and the defendants appealed to the district court, which, in the last instance, reversed *in toto*, the decision of the probate court, and decreed against the plaintiffs; from which this appeal is taken, as above stated.

It is contended, on the part of the appellant, that the evidence contained in the record of the former proceedings before the district court, cannot be legally resorted to for testimony in the last trial. This objection to the

evidence therein contained, and which was not heard as the foundation of the last judgment, we believe to be correct; and shall proceed to examine the case accordingly.

Considering the matrimonial rights of the appellant and her late husband, under the government and direction of our laws, no doubt remains of the legality of her claim, if it be supported by facts. In support of the greater part of the amount which she claims; the evidence offered is copies of certain deeds of sale, of her paraphernal estate, made by her husband to various persons, taken from the records from the other states and territories of the union, where the original acts are stated to have been recorded; and the testimony of one witness as to the genuineness of those copies being a true representation of the original; and the amount of money and value of other property received by the husband, being the price and considerotion of said sales.

To the introduction of this evidence, no bill of exceptions appears to have been regularly taken.

The only exception on the record, in relation to this part of the proceedings, is one taken by the counsel for the appellant, to the

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opinion of the judge *a quo*, by which he refused to admit the copies aforesaid, as full proof. Being admitted, without opposition, the only enquiry to be made is, as to their effect. Copies of written instruments, (except they be of authentic acts, certified by the proper officers,) are certainly inferior evidence to the originals, and ought not to be received, unless the latter be wholly without the power of the parties to a suit, and beyond the reach of the tribunal which holds jurisdiction of the cause. If, however, they be admitted without opposition, and are proven to be real transcripts of the originals, their effect in evidence must be the same as would be produced by their originals. The copies of the deed, in the present case, do therefore, prove the sale of the property therein described; and as it is shewn that it made a part of the inheritance of Mrs. Pannel, she is entitled to a privilege on her husband's estate, for the amount actually received by him, as the price of said property.

That the price was paid to the husband we have the testimony of one witness. The fact of payment may be well proven by a single witness; two are only required by law to promises or verbal contracts, above five hun-

dred dollars. It might be objected, that when the proof of facts is received to support an implied contract, more than one witness ought to be produced. But we are unable to see any difference in relation to the interest of the community, by admitting one witness to establish a fact in discharge of an obligation, or to sustain one by which an obligation would be implied.

We are, therefore, of opinion, that the copies of the deeds, and the testimony of the witness Cobb, sufficiently established the claim of the appellant to a preference and privilege on her husband's estate to the amount therein specified. Neither have we any doubt, in relation to her claim for that portion of her inheritance which her husband received and used; derived from the compromise with the corporation of New Orleans.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be avoided, reversed, and annulled. And it is further ordered, adjudged, and decreed, that the judgment of the court of probates be affirmed, with costs to be paid by the present appellees.

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BALDWIN vs *WILLIAMS.*

The act of extinguishing a debt, dispenses with the previous declaration of the intention of extinguishing it.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The petition is in the name of Baldwin, "who sues for the use and benefit of N. Cox," states that the defendant is indebted to the plaintiff on a promissory note.

The answer states, that S. Gardner became the purchaser of a negro named Little Jacob, his wife, and three children, at the probates' sale of the estate of L. H. Gardner, her late husband. That the plaintiff having large claims for himself and others, against the estate, induced the defendant to purchase said negroes from said Sarah; and then for the consideration of the purchase he gave the note sued on and others to the plaintiff, and took the said Sarah's conveyance; after which, and before its maturity, Jackson and Reynolds instituted a suit, to make said slaves liable for the payment of their claim; that the plaintiff had notice of said suit, in which said slaves were rendered so liable. The defendant averred that their value was not sufficient to satisfy Jackson & Reynolds's claim, wherefore the consideration of the note failed; therefore he

prayed that the note sued on and the others be cancelled. He further pleaded the general issue.

In answer to interrogatories put by the defendant, Baldwin declared on oath, that the note on which the suit is brought, and another executed at the same time, were given as the consideration for the negroes mentioned in the answer, sold and conveyed to him by S. Gardner; and he does not know of the defendant receiving any other consideration therefor. He did, as the friend and counsel of the defendant, advise him to buy the said negroes from her, and he may have been instrumental in effecting the sale. The defendant gave him the said notes (the consideration of the sale) instead of giving them to S. Gardner, though in receiving them, he acted as the attorney of N. Cox, the real plaintiff in the cause. During the life of L. H. Gardner, S. Gardner's husband, and before the settlement of his estate, claims were put into his hands against it for collection to the amount of $11,052 62. including interest and costs, to Sept. 29, 1724, and among them N. Cox's for upwards of $2,500. Previous to that time, viz: on the two last days of June, the estate had been sold by the parish judge,

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on a credit till the 1st of April following, and S. Gardner had purchased several slaves, and among them those mentioned in the answer, and the defendant became her surety for the price, viz: $2450, and being alarmed at his situation, applied to the defendant for advice and assistance, and endeavored to induce him to take the slaves, at costs, and give a receipt therefor. This was declined; but he offered to take them at $2200, which was not accepted. From the sale till the date of the notes, S. Gardner was deemed if not insolvent, at least, not certainly in a situation to pay the price of the slaves, which gave rise to the defendant's anxiety. Under these circumstances he applied to the respondent, as his friend and counsel, as the latter understood, for aid and advice, which was freely and honestly given, and as the only apparent means of relief, was to take the slaves from S. Gardner, under his conveyance, it was done. In his settlement with S. Gardner the defendant acted as the attorney of the claimants, who had resorted to him. Had no other mean of being paid, after the sale, except the proceeds of it, he received from her an assignment of the sums due by the purchasers to the amount of her purchase, for

which the defendant was her surety. At the final settlement with S. Gardner, Sept. 29, 1820. the defendant accepted her bill of sale for the slaves, and executed the notes, one of which is the subject of this suit. In consequence of which, and at the same time the defendant gave S. Gardner a full and final discharge and acquittance. The notes were received by the respondent, as the attorney of N. Cox, to whom they were offered; but they were, at his request, returned for collection. They were made payable to the respondent, to avoid the necessity of Cox's endorsement, and facilitate their collections, the respondent having no interest therein. It was not till some time after the settlement, that any claim was set up to the slaves, and that any doubt was entertained as to the validity of the defendant's title, at least to the respondent's recollection.

The district court, being of opinion that the consideration of the note had failed, gave judgment for the defendant, and the plaintiff appealed.

The documents offered by the plaintiff and appellant are:

The defendant's note, mentioned in the petition; the execution of which was admitted:

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An extract of the proces verbal of the sale of L. H. Gardner's estate:

The sale from S. Gardner to the defendant, referred to in the answer:

The record of a suit, *Cox* vs. *Gardner*.

The defendant offered the record of the suit, *Jackson & al* vs. *Williams*, 12 *Martin*.

An account between J. Baldwin and the estate of L. H. Gardner.

There cannot certainly be any doubt that if the note sued on had been given to S. Gardner, and was still in her hands, the defendant could successfully resist the payment of it, on the ground that she gave no consideration for it, or that that which she gave has since proven to be absolutely worthless, and that therefore if she pocketed the amount of the note she would enrich herself at the loss of the payer.

The consideration of the note of the defendant has clearly failed; and there cannot be any doubt that if the vendor sued on it his claim could be successfully resisted.

The defendant urges that there has been only a delegation and no novation; that the plaintiff's claim on his vendor, has not, in any of its parts, been extinguished, and that con-

sequently he is perfectly at liberty to oppose to his new creditor every exception of which he could avail himself against the former, his vendor.

The plaintiff, on the contrary, insists; that there has been a novation, and the former claim against the defendant's vendor is utterly extinguished. This is the gist of the case.

The plaintiff prefers the evidence of the novation, in his answer to the defendant's interrogatories; "In consequence of which," (the defendant's executing the note sued on,) "and at the same time a full and complete acquittance and discharge was given by the respondent to her," (S. Gardner) An unsuccessful attempt has been made to shew that this discharge was given at a posterior day. But the account by which it is made, proves nothing, as it is itself without a date.

The defendant admits that the plaintiff has done an act, which, perhaps, extinguishes the debt; but he contends that nothing in the evidence induces a belief, that such a discharge was any other than a spontaneous voluntary act of the plaintiff gratuitously made, because the plaintiff had not, before the defendant executed the note, made any express nor even

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implied declaration of his intention to discharge the original debt.

It appears to us, that as the acquittance was given in consequence of, and *at the same time* as the note, we must presume it was given in his presence, and consequently with his knowledge, and without some evidence of any expression of his disapprobation, we must conclude that it was done with his consent, and according to the intentions of all the parties.

The act of extinguishing a debt, dispenses with a previous express declaration of the intention of extinguishing it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, reversed and avoided; and proceeding to give such a judgment as ought to have been, in our opinion, given below, it is ordered, adjudged, and decreed, that the plaintiff recover from the defendant the sum of four hundred and sixty dollars, with interest at ten per cent. as mentioned in the note, from the first of April, 1821, till paid, with costs in both courts.

Baldwin for the plaintiff, *Scott* and *Thomas* for the defendant.

BYRD vs. *CRAIG.*

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CRAIG.

Whilst a note remains in the hands of the payee, the maker may refuse payment, if the consideration has failed.

If a party refuses complying with his part of contract, the other may decline his: and the subsequent conduct of the former will not renew the obligation of the latter.

APPEAL from the court of the seventh district.

MARTIN, J. delivered the opinion of the court. The plaintiff sued on two notes of the defendant, who pleaded the general issue; and that the former pretending to have a title to a tract of land, sold it, through the agency of Bowie, to the defendant, and bound himself to give a warrantee deed, and received the notes sued on. He averred that the plaintiff, however, made no title, and his inability to make one; that he was greatly injured by the plaintiff's conduct; lost the opportunity of selling the land; and spent large sums of money in improvements. He concluded with a prayer, that the contract might be cancelled; and the plaintiff directed to pay damages.

There was a verdict for the defendant, and damages to the amount of $250 were given. He released these damages.

The district court gave judgment that the contract and notes be cancelled, and that the plaintiff pay costs. He appealed.

The statement of facts shews, that the plaintiff produced the notes, and offered and filed a deed of the land to the defendant.

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Bowie, a witness of the defendant, deposed, that he was the plaintiff's agent in making the bargain for the sale of the land, which was confirmed to his father by the United States' commissioners: That his father, by a penal bond, bound himself to convey it to the plaintiff: That the defendant, some time after the bargain, applied to the witness for a deed or a restoration of the notes, and was answered, the witness had no authority to make the deed, and referred him to the plaintiff: That the defendant has repeatedly applied to the witness to take back the land, as the plaintiff had not made, nor could make, a title; and on the witness's refusal, said he would abandon the land, which he has done, and the witness has since seen another person on the land. The witness, in selling the land, as Bowie's agent, acted under private instructions. His father's bond to Bowie, he believes to be on record, in the office of the parish judge. Had the defendant had a title, he could have sold the land, or a part of it, to one Lacy. The defendant bought, he understands, with an intention of erecting a mill on the land, and was prevented from doing so, by his inability to have a title. He has made improvements to the value of

$300 or $400. The witness wrote to plaintiff to make a conveyance, but he failed doing so.

A new trial was moved for, on the ground of the verdict being contrary to law and evidence—of substantial justice not being done. It was refused.

The notes of the defendant being still in the payee's possession, the former had a right to resist the payment, if the consideration on which they were given has failed. This consideration was, that the plaintiff should make a title. He neglected to do so, on the request of the defendant. The latter, then, was entitled to refuse complying with his part of the bargain, of which the plaintiff declined to perform his. The subsequent filing of the deed which the plaintiff had hitherto refused to give, cannot avail here. The district judge was bound to pronounce on the facts pleaded as they stood at the trial of the plea. The facts set forth in the answer, are sufficient to overthrow the plaintiff's claim. No subsequent act of the latter, not concurred in by the former, can place the case on a different footing.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

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BINUM
vs.
LEMOINE.

Scott for the plaintiff, *Thomas* for the defendant.

BYNUM vs. *LEMOINE.*

A sale of minor's property without the legal solemnities, is void. And the circumstance of the parish judge not knowing it was the property of minors, will not render it valid.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The petitioner avers that he is tutor to Isaac Lowe, a minor, under the years of puberty, and that his ward inherited from his ancestor, a negro slave named Hannah, and a mulatto slave called Cloe, whom the defendant has taken into possession, and refuses to give them up.

The defendant sets up a title to the slaves claimed, in virtue of a sale made to him by the court of probates—a sale which, as appears by the evidence, was ordered at the request of the second husband of the minor's mother, after her decease.

This sale appears to have been made without a family meeting, and without an observance of the other formalities prescribed by law for the alienation of minors' property. It is therefore illegal, and this illegality is not cured by shewing that the parish judge, when he

made the order, conceived he was selling the property of a person, other than the minor.

There is no evidence in the record which shews the value of the services; and we do not think this a case, in which the plaintiff should be aided by remanding the cause to ascertain them. There is not any evidence that the defendant knew the property acquired by him belonged to the plaintiff—it appears to have been held in good faith.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Oakley for the plaintiff, *Wilson* for the defendant.

COX vs. *WILSON.*

APPEAL from the court of the sixth district.

The case will be remanded, if the finding of the jury leaves room to doubt.

MATHEWS, J. delivered the opinion of the court. This suit is brought against the defendant, as surviving partner of the community of acquests and gains which existed between her and her late husband, James H. Gordon, to recover a debt contracted by the said James,

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during his life time. The petitioner also prays a decree that his claim may be satisfied out of the property and effects belonging to the estate of the husband as administered by the defendant in her capacity of trutress of the minor children, as well as out of her separate property.

The answer sets up a defence. 1st. A remuneration by the wife, of the community of gains. 2d. That the estate of her late husband has been fairly and justly by her administered, for the benefit of all who may be interested in it.

The case was submitted to a jury on special issues, who returned a verdict; upon which the court below gave judgment in favor of the plaintiff, confining his right of recovery to the estate of the late husband; from which he appealed.

The facts submitted to the jury are all found favorably to the widow's privilege of remuneration; except the eighth, on the part of the plaintiff. In the finding of this fact, there is something obscure and unsatisfactory. It is stated to be true, that the defendant did retain certain negroes therein designated; but that she kept them as her own. If they be really her *biens propres* or paraphernal estate, and she

has honestly renounced the community, she has clearly a right to retain them free from pursuit on account of the debts of srid community. But the finding of this fact leaves her right doubtful, as the property is not positively declared to belong to her individually, and as no titles are found. This case is very similar in its situation to that of *Pannel* vs. *Coe, & al.* decided at the last term of this court, which was remanded on account of uncertainty in the evidence. *Ante*, 355

We are of opinion that justice requires the same kind of judgment in the present case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed, and annulled; and it is further ordered, adjudged, and decreed, that this cause be remanded to the court below for a new trial; and that the appellant pay costs.

Baldwin and *Johnson* for the plaintiff, *Wilson* for the defendant.

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SYNDICS OF BROOKE *vs.* HAMILTON.

SYNDICS of BROOKE vs. *HAMILTON.*

When the record does not shew a case was referred by consent, the reference will be presumed to have been made under the act of assembly for the reference of long and intricate accounts.

APPEAL from the court of the seventh district.

MATHEWS, J. delivered the opinion of the court. This case was before the court in sept. term, 1821; and was then remanded for a new trial, which has since taken place; and the plaintiffs being dissatisfied with the judgment last rendered, took the present appeal.

The case in the court below, in consequence of intricate accounts, was, by order, submitted to arbitrators, as therein termed. This reference took place without the consent of the parties, and consequently must be considered as made in pursuance of the law which authorises such references by the sole act of a court, for the purpose of having long and intricate accounts liquidated.

The referees reported in favor of the plaintiffs $526; but proceeded to state a purchase of land made by the defendant, half of which, the district court decreed, should be taken by said plaintiffs at the valuation of $ 5000, and rendered judgment for $ 3526, being the balance of the $ 526. This judgment is erroneous, so far as it relates to the land in question; a point which was settled by the former judgment of this court. See 10 *Martin*, 285.

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Considering the report of the referees, as containing evidence of the amount really due from the defendant to the plaintiffs, it authorises a judgment to that extent, in favor of the latter, which ought to have been rendered unconditionally, by the district court.

It is therefore ordered, adjudged, and decreed, that the judgment of the court below be avoided, reversed, and annulled. And proceeding here to give such a judgment as ought there to have been given; it is further ordered, adjudged, and decreed, that the plaintiffs and appellants do recover from the defendant and appellee the sum of eight thousand five hundred and twenty six dollars, with costs in both courts.

Bullard for the plaintiffs, *Thomas* for the defendant.

KIMBLE vs. *KIMBLE & AL.*

Creditors may seize the property of their debtor, transferred without consideration.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The petition states that M. W. Kimble, by an authentic act, and for a valuable consi-

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deration, conveyed to the plaintiff, with other property, real and personal, a negro slave called Sarah, who, ever since has continued in his possession and his property—that she has, however, lately been seized to satisfy a judgment obtained by J. Smith, against said M. W. Kimble. It concluded with a prayer for an injunction, and that the said Smith, the sheriff and the deputy sheriff, and the said M. W. Kimble, be condemned to pay him $500, for damages he has suffered, that he may be quieted in his possession, and have further relief.

The defendant Kimble and the sheriff, pleaded the general issue.

The former further pleaded, that the sale alleged in the petition was a simulated one, and was made at a time, when he was much embarrassed, and with the view of protecting his property from executions, and that afterwards he surrendered to the plaintiff the notes he had given to him, as the consideration of the sale, and he required that the plaintiff might be ordered to answer certain interrogatories, on oath.

The sheriff farther pleaded, that the slave was pointed out to him, by the defendant Kimble, to be seized, for the satisfaction of the *fi. fa.*

In answer to the interrogatories of the defendant Kimble, the plaintiff answered :

1. That the consideration of the sale was the notes and mortgages, mentioned in the authentic act.

2. They were surrendered to the defendant Kimble; the plaintiff never paid them.

3. He does not recollect that he ever promised to return the bill of sale. The defendant frequently told him he might keep the property, and consider it as his own, and that he would rather that the plaintiff should have it than any body else. The plaintiff considered the property as his own, according to the sale, and was the legal owner authorised to dispose of it.

4. The original intention of the parties was to prevent a sale of the property by the sheriff. The defendant said he expected to lose the property ; at all events, he did not care whether he ever got any part of it. The plaintiff considered himself as the legal owner, and sold a part of it with warranty, with the defendant's knowledge.

5. He never considered himself bound to give up the property. He considered it optional with him to give it up or not.

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The deputy sheriff pleaded, that he acted by the orders of his principal.

The creditor, plaintiff in the *fi. fa.*, pleaded the general issue, and that the sale exhibited by the plaintiff is a somulated one, and void as to creditors.

The injunction was made perpetual; and the defendants appealed.

The defendants introduced in evidence the record of the suit, in which the *fi. fa.* issued.

The plaintiff introduced his deed of sale, and the vendor's discharge.

J. Kimble deposed that the plaintiff sold 150 acres of land, which W. M. Kimble had sold him. He had lived on the premises about two years. The plaintiff conveyed the land, at W. M. Kimble's request, by letter. The plaintiff has none of the negroes mentioned in the deed of sale, except Sally; she has been on the plantation purchased by the plaintiff from Plauche, about two years.

Cappele deposes that W. M. Kimble made a bargain for the sale of Charity, and the plaintiff made the title; Scott made a bargain for 400 acres of land, but W. M. Kimble and the plaintiff made the title.

J. Kimble deposed he heard the plaintiff

say he had the property to hold for W. M. Kimble.

Our attention is first arrested by a bill of exceptions taken to the opinion of the court, in ordering the plaintiff to answer W. M. Kimble's interrogatories.

It does not appear to us that the judge erred. The interrogatories were pertinent and material to the cause, in his opinion, and the defendant had sworn they would materially aid his defence.

The evidence in the case shews, beyond the possibility of doubt, that the plaintiff holds the slave Suzan, without having paid, or being bound to pay, any thing therefor. That she was conveyed to him for the purpose of being protected from the claim of the creditors of her owner; that no alienation was intended, is to presumed, from the distressed situation of the alienor, and the subsequent conduct of the alienee, who (when the alienor found the chance to dispose of part of the aliened property,) made a title to the alienor's bargainee. *Nemo presumitur donare.* The simulation of the sale is clearly proved: the vendor is a party to the suit; and has clearly shewn that the plaintiff and vendee holds to his use—the

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property, consequently, is liable to the creditor's execution.

It is therefore ordered, adjudged, and decreed, that the judgment be annulled, avoided, and reversed; and that the injunction be dissolved, and that the plaintiff pay costs in both courts.

Thomas for the plaintiffs, *Bullard* for the defendants.

SIBLEY vs. *SLOCUM.*

The alleged attorney of absent heirs, is bound to shew his authority and the right of those claiming as heirs.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This action was commenced in the district court against the administratrix of a vacant estate. Judgment was given for the plaintiff; and the defendant not having prosecuted her appeal, it has been brought up by the alleged attorney for the aqsent heirs, who suggests that the authority of the administratrix has ceased by the operation of law, and that he legally represents the estate.

There is nothing further shewn than the bare suggestion of the attorney at law in sup-

port of the allegation. He has urged that his appearance before this tribunal is sufficient to prove the fact, necessary to maintain the appeal. But in this, we think, he mistakes the presumption attached by law to his act. A licensed practitioner in our court is presumed to act in good faith, and that he has been duly authorised by the person for whom he appears: but this appearance does not *establish the quality of his claim*, nor any other fact necessary to support the case.

It is therefore ordered, adjudged, and decreed, that this appeal be dismissed, with costs.

Rost for the plaintiff, *Desblieux* for the defendant.

HENDERSON vs. *STONE.*

APPEAL from the court of the sixth district.

Accidental or overpowering force does not excuse the performance of an aleatory contract.

PORTER, J. delivered the opinion of the court. This action was commenced on a written contract, by which the parties to this suit agreed to run with certain horses "a fair and honorable race," on a day fixed, for the sum of $1000. It was also stipulated, that in

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case either failed to comply with his agreement, he should pay to the other five hundred dollars.

The defendant denied the contract, and pleaded that it was bilateral, and not executed in duplicata. And further, that he was prevented from running the race by accidents over which he had no control, and which no prudence or foresight could have prevented.—Namely, by his horse running away and killing himself, in training.

The article of agreement entered into between the parties, and read in evidence, purports, that the plaintiff and defendant entered into a contract, to run a race, such as is set forth in the petition.

The plaintiff offered a witness to prove, that in the negotiation which preceded this agreement, it was proposed to the defendant, the contract should be so made, that if either of the horses should be prevented from running on the day appointed by death, neither the sum bet, nor the forfeit, should be due to the owner of the other horse: and that a written contract to that effect was drawn up and presented to the defendant, which he refused to sign. The judge refused to receive this testimony, and the plaintiff excepted.

We think the judge did not err. If the testimony offered either added to the written agreement, or diminished it, the court could not legally receive it; for it would have been contradicting by parol, what the parties had reduced to writing. If it neither increased or diminished the stipulations, it was useless. It was not admissible to explain the instrument; for it was clear and plain, and required no explanation.

Taking then the written contract, as the best evidence of what the parties covenanted to do, we proceed to examine its legal effect. The counsel for the defendant has referred to authorities, for the purpose of shewing, that where a person, who has entered into an obligation to do a particular thing, is prevented by accident, or overpowering force, there is no ground for claiming damages for the non-performance; and that the nullity of the principal obligation, always carries with it that of the penalty. *Pothier, traité des obligations, nos.* 149, 338, & 339. Of the correctness of this doctrine, in ordinary cases, there cannot be a doubt; but we think it does not apply here. The contract, on which the action was commenced, is an aleatory one; and it is of the essence of such a contract,

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that there should be risque incurred on one side or the other. The defendant, when he entered into an engagement to run his horse by a particular day, or pay five hundred dollars, took all risks; as well those which preceded the race, as those which might have occurred at the moment of running. If the horse had become lame, or sick, so as to have been unable to start, or if started, unable from these causes to run with his accustomed velocity, there cannot be a question that in the first hypothesis, the forfeit would be incurred, and in the second, that the race would be lost: though in both instances there was accident, or the occurrence of an event which could not be controlled. We are unable to distinguish between those cases and that now before us; between partial and entire disability; between the horse falling down and killing himself after he starts, or before. In both these cases the relative speed of the horses, which was the principal object of the contract, could not be ascertained, and yet in the former it is admitted the race would be lost. It is our opinion all risks were included by the agreement; and this construction, it is believed, meets the intention of the parties, who, it is probable, intended the penal-

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ty, as a compensation for the trouble and expense in preparing their horses. There is a case in the English books, where two young men made a bet depending on the lives of their respective fathers. It turned out one of them was dead when the wager was made. This circumstance would certainly have avoided an ordinary contract. Yet the agreement was enforced. This case certainly presents new ground, to which we are not familiar, and on which we tread with diffidence, but the result of our best judgment in the matter, is, that the plaintiff should recover.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Johnston and *Wilson* for the plaintiff, *Thomas* for the defendant.

INNIS vs. *WARE*.

APPEAL from the court of the sixth district.

Under a plea of compensation, if the defendant offer evidence that would support a charge of usury, it is error to reject it.

PORTER, J. delivered the opinion of the court. This action was commenced on an account, in which the plaintiff's claim for money

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had and received to his use: the hire of negroes, the use of oxen, &c. The defendant pleaded demands of the same nature, in compensation; and prayed judgment for the balance due him; the jury found a verdict in his favor; and the plaintiff appealed.

without any objection made thereto in the lower court, none can be made above.

A jury may find a verdict for a sum due to th e defendant.

The evidence of the defendant was given in the court below without opposition; but it has been objected here, that it should not have been received, as the matters offered in defence were not such as could be pleaded in compensation. We think the objection came too late; and even if made below, could not have availed the plaintiff, as the defence was properly offered as a plea in *reconvencion Curia. Phill. juicio civil, peremptories*, § 15, *no.* 9.

An application was made for a new trial, on the ground of newly discovered testimony. It was bottomed on an affidavit of the attorney, that his client was absent, and that since the trial he had discovered evidence that he was induced to believe would be material and important to the interest of the plaintiff. This evidence consists in a memorandum made by a person residing out of the jurisdiction of the court, shewing a division of a crop of cotton made in 1821, between the present parties. A

copy of this memorandum is shewn to have been taken by the plaintiff himself before the trial. And admitting it was material, which is not clear to us, we have no doubt that it was a want of due diligence in the plaintiff not to have informed his attorney of the fact.

It has been contended that under the act of 1821, the court erred, in giving judgment against the plaintiff, because the statute does not authorise a jury to give a verdict in favor of the defendant for any particular sum. The statute authorises payment for the balance of any claim which may be found due, and the court can, as legally ascertain that balance through the medium of a jury, as in any other mode.

The verdict, we think, has done justice, and we order, adjudge, and decree that the judgment rendered on it, be affirmed, with costs.

Scott for the plaintiff, *Thomas* for the defendant.

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A *dation en paiement* does not require a compliance with the formalities required in case of a donation.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This action was commenced, to recover the possession of a negro girl, about eleven years old, whom it is alleged the defendant wrongfully retains from the plaintiff.

The defence set up is, a donation made by the plaintiff to the wife of the defendant, and possession for upwards of five years.

The parol evidence given on the trial, was received without opposition or exception. We are therefore at liberty to examine what effect the contract proved should have between the parties.

Elizabeth Holme proves, that the plaintiff, (who is mother to the defendant's wife,) told the witness, that the negro child was not worth the raising, and that she had given it to her daughter, on condition she would rear it; that the latter took the child, and did so.

George Hays swears, that he has known the slave who is the subject of this suit, to be in the defendant's possession, since the year 1812.

Thomas Patterson declares, that he has

known the negro girl named Mint; that he has frequently heard the plaintiff say, that she belonged to the defendant's wife. And on the marriage of the latter, the former delivered to her this slave.

Elizabeth Miller deposes, that the plaintiff informed her, that she had given the girl Mint, when an infant, to her daughter, for the trouble of raising it, its mother being compelled to leave it every day to work on the other side of the river.

On the part of the plaintiff, it was proved, that the slave claimed was born in her possession.

The contract under which the defendant claims the property, is not a pure and simple donation, but one in remuneration of services rendered. It amounts to nothing more than a *dation en paiement*, and did not require the forms prescribed by law for donations purely such. This subject was fully gone into in the case of *M'Guire* vs. *Amelung and others*, 12 *Martin*, 649; and we refer to the authorities quoted, and the reasoning used in that cause, as the ground of our decision in this. We think judgment ought to be for the defendant.

It is, therefore, ordered, adjudged and de-

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creed, that the judgment of the district court be annulled, avoided, and reversed; and that there be judgment for the defendant, with costs in both courts.

Mills for the plaintiff, *Rost* for the defendant.

STAFFORD vs. *STAFFORD.*

Answers to interrogatories, contradicted by one witness, will make proof unless his testimony be supported by strong corroborating circumstances.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The defendant is sued on a promissory note; and pleads that he has paid it. To establish his defence, he has propounded interrogatories to the plaintiff, who, in his answer, denies that any payment has been made. Testimony was given to disprove this answer, and the only question which the case presents is, whether that testimony satisfies the provisions of the law, on this subject.

A witness was introduced, who swore that he heard the plaintiff acknowledge the note was paid. So far the direction of the statute is complied with; but, we have looked in vain through the record for the "strong corroborating circumstances" in support of this witness

which the act requires. 2 *Mar. Dig.* The judge *a quo* in his opinion states, that he considers them furnished by the testimony of one Joseph Chambers, who proved that the slaves of the defendant cropped with those of the plaintiff, in the year 1816. Admitting that this fact would authorise us to draw the same conclusion, we are unable to discover that it is proved by thiswitness, or by any other, whose evidence is now before us. His testimony is, "that he understood that more hands cropped with Leroy Stafford, in the year 1816, than his own hands. Some of which were his sister's, and, *perhaps*, some the defendant had a claim on, or, *perhaps*, he might have owned them." This, so far from being a "strong corroborating circumstance" in favor of the witness's declaration, that he heard the plaintiff acknowledge he was paid: presents not even a light presumption in favor of it, for it amounts to nothing more than conjecture, that the defendant had slaves at work under the plaintiff's care, and gives no other circumstance by which that declaration can in any respect be considered as fortified.

It is therefore ordered, adjudged, and de-

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creed, that the judgment of the district court be annulled, avoided, and reversed. And it is further ordered, adjudged, and decreed, that the plaintiff do recover of the defendant the sum of nine hundred and fifty dollars, with interest at six per cent. from the first day of January, 1815, until paid, and costs in both courts.

Baldwin for the plaintiff, *Thomas* for the defendant.

DAVIS vs. *PREVOST'S HEIRS.*—12 *Martin*, 445.

Whether the vendee can recover land, which the vendor, before the sale, has sworn to belong to the person in possession?

APPEAL from the court of the fifth district.

J. S Johnston, for the defendants. The legal principles upon which this case depends, have been discussed with ability by two learned counsel, and most of the points of law and evidence adjudged by the court in the case of *Prevost's* vs. *Johnston's heirs.* 9 *Martin*, 123.

Taking the law as it has been settled, and the evidence as it is acknowledged to be, I shall present only such considerations as have not been drawn into the argument, and endeavour to pin the attention of the court upon the points on which the case now depends.

It is not contended then, that the plaintiffs,

or any person, under whom they pretend to claim, have ever actually occupied or cultivated the land. They have had merely a civil or constructive possession under their title. Their grant is dated in 1777: since which they have made no claim, nor exercised any right of ownership over it.

It is true that Lessassier actually cultivated the land in indigo, on the west side, in 1776, and continued on the land until 1780, at which time Macarty entered, and remained upon the land, until 1785 or 1786. He made a way across the bayou, cut the wood, made a clearing, and one year had corn on the east side. It then remained unoccupied until Loisel entered, under the sale from Macarty's heirs to Prevost, who has been in possession ever since. The land in dispute lies opposite the improvement, where Lessassier and Macarty lived, and included the clearing made on the east side.

We must be quieted, unless they shew a better legal title—which they cannot. 1st. Because their title has been virtually released to the defendants. 2d. Because it has been lost by prescription.

If the present plaintiffs have any right, it is

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derived from the recognitive act. This is merely confirmatory of the primordial title, and conveys no new right. It is evidence of the enumerations it contains; to wit: That the grantees had sold and conveyed all their right to La Houssaie. The heirs could sell no right, unless they inherited from the ancestor. They did not inherit from him, because he, by a judicial confession, has acknowledged a relinquishment of his title.

The board of commissioners was established by act of congress, to hear and determine upon the rights of individuals to lands, according to law. It was a court of record, with a limited jurisdiction. This board received written notices of claims; took evidence in writing, subscribed by witnesses, in the form of depositions; kept a record of its proceedings, by a clerk; and adjudged the rights of the parties—it was essentially a court. Before this tribunal the heirs of Macarty presented their claim to this land. There was a difficulty then, which is yet felt, in shewing title. The lapse of time, the death of witnesses, the conflagration of his house, the loss of papers, and, above all, there were existing grants on the land, to which La Houssaie had the legal title. They appealed to

the integrity of La Houssaie, the only person having an adverse right—and, perhaps, the only one acquainted with the transactions. He, with a noble disinterestedness, declared in writing, and under oath, "That he knows of Col. Macarty having purchased of Vincent Lessassier 80 arpents of land front, with the depth of 40 arpents on each side of the Bayou Teche; and that he, the said Lessassier, purchased the same of four other persons, and was bounded above and below, on said bayou, by lands of Madame Loisel.

He proves also the settlement and cultivation by Lessassier and Macarty, and has been known to *him*, and *generally*, as the property of Col. Macarty. That the government refused to re-grant the land, although often solicited; and that the taxes were always paid by Col. Macarty, up to the time of the sale to Prevost." The heirs of Macarty called upon La Houssaie to acknowledge or deny their title. It was in substance tendering him the decisory oath; and he recognised their title; and, in effect, acknowledged that whatever right he had under the grantees, had, in some way not necessary to explain, ceased, to the benefit of the claimant.

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This declaration stands in the place of a recognitive act, and confirms our title. It makes all things plain. It supports a presumption, created by forty years' abandonment. It corroborates the acknowledgment of Herbert, that Macarty had acquired the land in some way. It corresponds with the general understanding of the country. It accounts for their continued claim; the occupation of both sides of the Teche; the surveying of 80 arpents on both sides; and the payment of taxes during many years, before the change of government. It verifies the oath and recognitive act of Madame Lessassier.

Lands were of little value under the Spanish government. Titles were obtained without much difficulty or expense, and surrendered without ceremony. Sometimes, by the toleration and usage of the country, removed from one place to another; often exchanged or relinquished to others, as suited their interest or caprice; and among a people, few of whom could read or write, and of whom it may with truth be said, that integrity and good faith had almost superceded the necessity of law. These transactions were often informally and negligently made.

It is impossible, in the nature of things, to explain every occurrence, and prove every act. After a lapse of thirty years, the law wisely presumes title.—Time supplies the place. It is not surprising that a sale should be lost, an exchange mislaid, or a chain of conveyance interrupted; and that after a length of time it should be forgotten by all but the immediate parties; and this has actually happened to the plaintiffs also. In the absence, then, of all law, and upon general principles of equity alone, the heirs of La Houssaie should not be heard to deny the truth, or the force of this declaration.

This avowal, made upon due notice, with great circumspection and solemnity, is, at least, not inferior to an act under private signature, which would convey or relinquish the title: One is a private, the other public, and of record. One is merely declaratory; the other has the sanction of an oath. One stands alone; the other is verified, by long acquiescence on one side, and continued claim on the other. But take from this tribunal its judicial attributes, and from the oath its legal sanctity, it would then stand as a *written confession*, but made in a proceeding of great public notoriety, and with great circumspection.

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La confession de celui à qui on impute un fait est un preuve suffisante en matiere civile, lorsqu'elle est faite dans les formes requises.

La confession se fait ou en jugement ou hors jugement. La confession judiciaire libre et simple faite en jugement par la partie même ou par son fondé de pouvoir est une preuve suffisante. A l'égard de l'aveu fait hors jugement, ou il est ecrit ou il ne l'est pas; dans le prémièr cas, il fait preuve complété contre son auteur; dans le second cas, comme il ne peut être établi que par temoins, il ne peut avoir d'effet que dans le cas ou la preuve testimoniale est permise. Ferriere, Dic. De Droit, vol. 4, p. 542, word "*Preuve.*'

The same law is found in all the French authorities, and in the *Partidas, & Civil Code.*

The plaintiffs cannot deny what is contained in their recognitive act, to wit: that they had full knowledge that their ancestors, the grantees, had, in the year 1787 made an exchange with La Houssaie pere, by which he acquired from the grantees the land at *Chicot Noir*; and as no sale is now shewn from him, the title must have continued in him, until his death. La Houssaie and Macarty were then adverse claimants; and the only claimants to the land.

The avowal of La Houssaie is full proof between him and Macarty and their *ayant causes*. The present plaintiffs hold, by a private act, from the heirs of La Houssaie. The evidence is therefore equally conclusive between them and those who hold under Macarty and his heirs, or *ayant causes*.

This confession of La Houssaie is either a judicial or a written confession; and in either case, is full proof between the parties, of what it contains; and they cannot evade the effect of any sale, or title, or confession, which he may have made.

The confession of La Houssaie was made in writing; subscribed by him before a parish judge; and is therefore equal to a notarial act, if it is not equivalent to a sale. But it was taken under oath, before the judge of the parish of St. Martin, by virtue of a dedimus from the board of commissioners, to be read in a case then pending before them in relation to the title of Macarty. It is therefore a judicial confession. It is made in a public office; and the same where the plaintiff's sale was executed. It was taken, and deposited, in the office of the register of lands; the most public office in the district, in relation to lands. It is duly certi-

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fied by the judge, in the usual form of depositions, and a sworn copy of the register, filed in this cause. (Certified copies from the register's office have heretofore been held good.)

An exception was taken to it in the court below, that it *was ex parte*. This is not parole evidence taken by deposition in the cause, by a dedimus from this court, in which notice would be required It is a copy of an act, which the law makes evidence; as a copy of any judicial proceeding, or writing is evidence.

There is an absurdity in the idea, as well as confusion in the mind, that a man's confession can be *ex parte*, as relates to himself and his heirs and assigns.—He is himself the party. There is no other objection, to the confession in the bill of exceptions. It is authenticated, as all other depositions; and that no doubt might remain in a question of so much interest to the defendants, they caused a copy to be furnished under the oath of the register, before a justice of the peace. It is evidence as a confession: and it is evidence as a deposition. The deposition of a deceased person taken on a petition to the general assembly of Connecticut (who were called on to exercise a judicial power) between the same parties, and relative

to the same point now at issue, will be received in evidence. 1 *Root*, 81. *Ray* vs. *Rush*. A party will be admitted to prove to a jury by a witness what a person deceased has sworn before commissioners appointed for a special purpose, by the legislature of Maryland. *Howell's Lessee* vs. *Tilder*. 1 *Hen. & Mun* 48. Evidence of what deceased persons have declared, is good; much more their written evidence.

"An *Onondago commissioner* (in New York) will be a competent witness to prove what persons deceased swore before the commissioners, in relation to a dispute about the title between the same parties." 2 *John. Rep.* 17. *Porter* vs. *Bailey*.

The only doubt here was as to the propriety of receiving parol evidence. But there was no doubt as to evidence taken before commissioners. What was admitted in a former suit *between those whose interest is now represented* in the present suit, by the parties, will be received in evidence. *Fitch* vs *Hyde*, *Kirby*, 258. Evidence of what a deceased witness has sworn on a former trial between the same parties admissible. *Peake's Evid* 39, *note*. 1 *Strange*, 162. *Pelten* vs. *Nelter*. 2 *Lord Raym.* 1166.

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The deposition taken in chancery is good. 2 *P. Williams*, 863. *Coke* vs. *Farindle*. "The declarations of a person in possession of land, as to his title, are admissible evidence against him, and atl persons claiming under him." 4 *John. Rep.* 230. *Jackson & al.* vs. *Bard.*

In the case of *Andrew's lessee* vs. *Fleming*, 3 *Dall.* 93, it was held, that a conversation between the husband of the defendant, under whom she held possession, and Collindar, under whom the plaintiff claimed, was admissible evidence.

Under particular circumstances *parol evidence* of *continued* possession on the part of the grantor, and the *grantee's acknowledgment of his right*, may be given in evidence, for the jury to presume against a deed, that the grantee has relinquished or re-conveyed his right. 1 *Henning & Munford*, 53, *Brigg's adm.* vs. *Alderson.*

It is too plain to multiply authorities. The confession is full proof of what it contains. It acknowledges with the force of a recognitive act, and with the solemnity of the decisory oath; and they are each of a dignity equal to an act under private signature, and full evidence between the parties and those who

claim under them; if not evidence against their persons.

In this case, the property was of great value. The question propounded to Macarty was of the greatest moment to the fortunes of those concerned. The proposition is distinct, certain, and definite; the mind of La Houssaie was fully awakened to the subject, and apprised of all the consequences. The answer is full and precise, That "the *land claimed*, to wit, eighty arpents front on both sides of the Teche, at Chicot Noir, *was the property of the late J. B. Macarty.*" The inference is perfect, that it dd not belong to La Houssaie. But the recognitive act proves, that at a period anterior, it had belonged to him; he must have known the fact, and had in his mind a distinct knowledge of the transaction, by which his title had been transferred to us; whether by sale or exchange. The declarant had a perfect knowledge of all the facts; and perhaps no man was ever called on to decide a question of greater interest or delicacy, in relation to himself. He had a legal title under the grantees: our title was lost; and we had no means of proving its loss or its contents; and we had no remedy, but by appealing to the conscience of the party.

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If confession is ever evidence, it is so here; from necessity, as well as for the purposes of justice. If we had foreseen this collusion between his heirs and the plaintiffs, we should have taken his evidence, *De bene esse.* If he had lived, and his integrity had yielded to the temptation which this speculation holds out, we should have availed ourselves of his answers to interrogatories: we should have faced him with his own avowal—and could he have denied his declaration?

If in the sale of Macarty's heirs to Prevost, La Houssaie had written, "I have always considered the land sold, as the property of the vendor," this would be a virtual relinquishment of his title? If he had written the same at the foot of a mortgage, he would be estopped from urging a claim against the rights of the mortgagee. The curator and executor are both bound by an inventory. An express acquiescence of a party in a sale or mortgage, will, in the courts of chancery, postpone the claims of the party, to those which he seems to recognize by not declaring himself. All these belong to a class of cases, founded upon obvious principles of natural justice, that the mind recognises as soon as perceived. The

courts of England and the United States have uniformly sustained them. Is it not equally binding, when executed publicly in an office, subscribed and sworn to? Can it lose its effect, by the form, or mode, or place of execution?

This declaration was notice to all claimants under Macarty that La Houssaie had no title. It would have been an open violation of faith, truth, and honor, if he had afterwards brought this suit, or sold any right to these lands.

But he never asserted any claim to it afterwards. He did not sell it. He died. The heirs succeeded to his rights; and no more. If he did not die possessed, the heirs could not inherit. They therefore had no right; and could sell none. La Houssaie could not recover these lands;—can his heirs do what the ancestor could not? Or create a higher title in their vendees than they had themselves?

They claim in the same right, with all the equity, and encumbered with all the conditions. If La Houssaie could not hold, or recover this land, he could not have disposed of it by will. If he had no right to will it, the law could not entitle them to inherit it.

There was but one mode by which our

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rights could have been impaired or weakened; and that was, by a sale by public act; which, under the laws of the state, might have prevailed over our title; and that, perhaps, would have depended upon the purchaser's knowledge of our title and possession.

This declaration is good against him; and is equivalent to an act under private signature. Let us pursue the analogy.

A sale under private signature, conveys all the right: The party acquires a legal title, which justifies his possession. The vendor has nothing left which he can sell, without committing fraud upon one or both of the parties. But having legally divested himself of all title as well as the possession, he dies. He transmits nothing to his heirs; and this sale is binding upon them; and is good against creditors.

A mortgage under private signature, is a legal mode of securing the payment of a debt. It may be defeated by a mortgage or sale by public act. Yet if the mortgagor dies without defeating it, the private mortgage remains a good security upon the property against all simple creditors; and is binding on the heirs. So a confession is proof against him and his heirs. It is not good against those, who pur-

chase from him, by *public act*, in *good faith*, *without notice*. But if he dies without making such act, then it being full proof against him, it is full proof against his heirs, as it must be against all those who buy from them. If the law is not thus construed, a private sale, or mortgage, or judicial confession, will have no effect but during the life time of the party, even if he acts with good faith. If the heirs may defeat the estate created, by selling by public act. If they can defeat it, they may do it with full notice, fraudulently and even collusively with the purchaser.

But upon general principles of justice, between men acting honestly, is it just, that a purchaser by priv te act, for a good consideration, in *possession*, should be dispossessed by heirs, whose ancestor received the price; supposing them to sell even to an innocent purchaser?

It is better that he should be bound to know of whom he buys, what title they have, and who is in possession.—That they should *take care*.

But when we contemplate the abuse of this right, the frauds it will legalize, the villainies it will encourage, the confusion of property,

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and ruin of individuals that will follow; the principle is too dangerous and revolting.

But if the heir finds another in possession, is that not notice to him? and can he, with good faith, sell what he finds in the possession of another, under the belief that he is the true owner? and can the purchaser appeal to the laws to protect him? He knows, at least, that the property is in dispute; that he buys a law-suit; that there is an adverse right; and that he must turn out of possession a *bona fide* holder.

Is he the innocent purchaser the law was made to secure? He is put on his guard; he knows the danger; he runs the risk; and at least buys only the haul of the net—the hope. But, on the other hand, the holder has no means of protecting himself. He ascertains there is no prior title; obtains possession; and has the consent of all parties; but he cannot guard himself against subsequent speculations of heirs, or fraudulent combinations to deprive him of his property.

It is alleged that the plaintiffs have a legal title from the heirs of La Houssaie, acquired by public act. That they are third persons; and innocent purchasers, without notice. While

the confession of La Houssaie is only good evidence against him, his h irs and assigns.

I reply, 1st. The plaintiffs have not produced a *public act made authentic, duly recorded* in the parish where the land lies. It lies in the parish of St Marie. The sales are made in the parish of St. Martin; and do not appear to be recorded. They are not, therefore, public acts. If both sales are private, the prior has preference. *Merlin, Questions de Droit, (Tiers.)* We had possession. If the titles were equal, the possession must prevail.

2d. They are not third persons, but *ayant causes* of La Houssaie and his heirs. They have only a private sale of the heirs conveying a *naked right.*

3d. They had notice of our adverse possession; and are not innocent purchasers.

An act of the legislature has provided, that all sales, mortgages, and liens, which dispose of, or encumber, real property, shall be made by public act, and duly recorded in the parish where the property lies, or it shall not be good against third persons. The object of this law is to protect third persons and innocent purchasers from private, clandestine, and fraudulent sales and mortgages. The act must re-

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ceive such construction as will meet the reason and intention of the statute; as will repress the mischief, and advance the remedy; and such interpretation as it ought to have standing with other laws on the same subject.

"An act under private signature, has, between those who have subscribed it, and their heirs and assigns, (*ayant cause,*) the same credit as an authentic act." *Code*, 306, *ar.* 224. It is not then necessary to record an act, for the benefit or protection of heirs or assigns. They are bound by what the ancestorhas done by private act. Heirs and assigns are not therefore third persons in the contemplation of law. The want of registering cannot be pleaded by any one of the contracting parties, their heirs or assigns. *Id. art.* 228.

An act under private signature has no date against third persons, but from the day it is enregistered, or from the day of the death of those who have subscribed it. *Droit Français, art.* 1328. From this it would seem, that death consummated the act; and as it regards his heirs, the act becomes authentic. That consequently they cannot afterwards sell to another what the ancestor has legally sold.

I will not contend here, as Toullier has

done, in commenting upon this part of the code in France, that *ayant causes* means all persons that hold under the same common title, or from the same source.

But I will adopt the other construction, that *ayant causes* here only implies those who hold under the same identical act.

Third persons then are all those who have not signed the act, and who are not their heirs, or who do not hold under them by that act.

It results still, that heirs are now third persons; and that consequently, a private act, or written confession, is binding on them, and their *ayant causes*, though not against third persons.

Again, the object of this recording is to give notice. But if the party has knowledge of the prior sale, he has notice; and under a similar law in England, and all these states, it has been uniformly held, that notice dispenses with the registry; because he is not an innocent purchaser. In this case we shew an adverse possession. The purchaser knew he was buying of heirs, who had only a naked right; and they were bound to know, that any private act of the ancestor, would be valid against the public act of the heir.

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By the Roman law, the heir to an inestate, who died before his entry to the inheritance, did not transmit his right to the heirs. So that he did not acquire the inheritance but by his entry to it. 2 *Domat.* 577. *case* 0. *(note.)*

Again, The seller, to inspire good faith, or to convey a perfect title, ought to join the right of property to the possession.

☞ It is stated by Judge Kent, 9 *John.* 58. *Jackson* vs. *Dermont.* "That it ts a well settled principle of law, that if a person out of possession conveys to a stranger land held adversely by another, the conveyance is void; so that the stranger cannot maintain an action upon it." "The principle is conformable to the whole genius of the common law." "It was the fundamental law of feuds, on the continent of Europe" Voet says, "Delivery is still necessary in Holland and Germany, to the transfer of real property."—"It is, no doubt, the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor had the capacity as well as the intention to deliver the possession; and actually does it." Blackssone says, "It prevails in the codes of all well governed nations; for possession is an essential part of the title

and dominion over property." 2 *Comment.* 311, 12.

"Where a *bona fide* purchaser of land enters under his deed, and continues in open possession of it, a second purchaser cannot avail himself of the first purchaser's neglect to register his deed;" because, as the whole object of the registry is, to give notice, and as there are circumstances within the knowledge of the second purchaser, *as strong as the registry of the deed*, to satisfy him of a previous conveyance, his purchase will be deemed fraudulent against the first purchaser; and he will not reap the fruits of his own iniquity." (*J. Parker,*) 6 *Massachusetts Repovts,* 487, *Davis* vs. *Blunt.*

Every civilized country had a similar law. Indeed it is essential to the well being of society. But it will be useful to see what construction has been given to it by enlightened men, for the purpose of restraining fraud, and attaining the ends of justice.

There is an able reading of this statute by Judge Trowbridge, (*Supt. to vol.* 3, *Mass. Rep.*) in which it is laid down, that possession is necessary to enable the party to sell; and that an adverse possession is good notice to a subsequent purchaser.

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"The registry is designed to give notice, in order to prevent purchasers being imposed upon by prior conveyances; which they are in no danger of when they have notice," "Possession and visible improvement of land, is such evidence of the alterations of the property, as will amount to implied notice thereof." "No fair purchaser is, in such case, in danger of being defrauded, if he uses the caution he ought to do." "The purchase of an estate, with express or implied notice of the prior conveyance is fraudulent." 1 *Burr.* 474. *Mansfield.*

It is said, in the case of *Davis* vs. *Blunt*, *vol.* 6, *Mass. Rep.* "No case can be stronger than the present, to shew the *reasonableness and necessity of such a construction of the statute.* Here the creditor assists in the sale of the land, by attesting the deed; lives in sight of the expensive improvements making by the purchaser; sees him in the daily occupation of his estate; and still, knowing of an inadvertence, he treacherously attempts to turn it to account, by seizing the property into his own hands, made valuable by the labor and money of the man he had ensnared.—If he could prevail, great would be the reproach of the law. "But our wise and learned predecessors have for a

long succession of years establishes a doctrine which totally defeats a fraud of this sort."

It is clear that where a vendor sells to two persons, that a fraud must be committed against one, or both. The object of the law is to prevent the fraud, and to protect the innocent. If A. sells to B. and retains the possession, and then sells to C., A. has committed a fraud; but B. has enabled him to impose on C, and ought therefore to suffer.

But if B. was in possession, C. would have notice, and would therefore buy with his eyes open. The recording of his deed, with knowledge of the adverse possession, would not entitle him to recover the possession A. held by a private act, much less could he recover, having only a private sale himself. *Pothier, traité de Vente*, 331. *art.* 317.

"*Lorsque le vendeur n'est pas lui même en possession de la chose qu'il vend, il est evident qu'il ne peut faire aucune tradition réelle ou feinte de cette chose. Car, la tradition étant* datio possessionis, *le vendeur qui n'a pas lui même la possession de la chose qu'il vend, ne peut la donner à l'acheteur;* nemo dat quod non habet. *Il ne peut en ce eas que subroger l'acheteur au droit qu'il a de revendiquer la chose; La de-*

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mande que donne l'acheteur en consequence de cette subrogation *; ne le saisit que du droit de revendiquer, et non de la chose revendiquée, qui lui a été vendue ; ce n'est que le délais qui lui est fait sur cette demande, qui le saisit de cette chose et qui lui en fait acquerir la propriété, en lui en faisant passer la possession." page* 332, *Traité de* Vente, *art.* 317. *Le contrat de vente ne peut pas produire par lui même cet effet, les contrats ne peuvent que former, des engagements personels entre les contractans; ce n'est que la* tradition *qui se fait en consequence du contrat qui peut transferer la propriété de la chose qui a fait l'objet du contrât ; suivant cet regle* traditionibus, non nudis conventionibus dominia transferuntur. I refer also to *art.* 319.

In the *Traité du droit de Propriété, vol.* 1, *p.* 283, *art.* 286, " *Regulierement, cette action n'appartient qu'a celui qui a le domaine de propriété, de la chose revendequée et ne peut être intenté que par lui. In rem actio competit ei qui aut jure gentium aut jure civili dominium acquisivit.*

In France, a lessee cannot be dispossesed by virtue of a public sale. See *Merlin, vol.* 6, (*tiers.*) And it has been held in this court, that a verbal lease, with possession, was good against a written one.

I might avail myself of the construction of the words *ayant cause*, which has given rise to an animated discussion in France. But, as that would defeat the end of the law, which properly understood, will be found to contribute, in a high degree, to the security of property, I adopt the most limited definition of the expression. I conclude that heirs and those who hold in their right are not third persons. That a private sale, or written or judicial acknowledgment, is good between the parties, their *heirs* and *assigns*. And that, consequently, a sale from La Houssaie's heirs, conveys only the naked right, which he had, by a previous act released to us. *Nemo dat quod non habet*. *Possession* is necessary to *delivery*, as *delivery* is to a *sale*. Adverse possession then implies a defective title; and is therefore notice in law of a prior conveyance.

Notice is equivalent to *registry*. Adverse possession being notice to third persons; they are not innocent purchasers; and, consequently, not entitled to tho favor or protection of the law.

This construction has been given by men of great experience, conversant with the affairs of men, and awakened by all the arts and sub-

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tleties, and combinations, by which the wary and the watchful surprise the innocent and overreach the ignorant.

In this case, then, La Houssaie has made an acknowledgment, which operates in law as an act of confirmation of our right, and a release of his own title. He dies; and his act, which before could not operate against third persons, is consummated. The heirs find us in possession, and sell to the present plaintiffs; and now they claim as third persons—innocent purchasers—surprised by our dormant title! They purchased with their eyes open. They prevail upon the heirs of La Houssaie to violate their good faith; to sell a speculative right—an expectancy: living in the country, in the face of our possessions; with a full knowledge of all the facts; and by a private title too!!

They purchase to be sure, not technically a *litigious* right, but what is worse, a *law suit—not pending*; but what, in point of morals, is more odious, a right to stir up litigations—and they are entitled to all the credit that results from the difference, by shewing that theirs is not a *litigious* right.—And these are the innocent purchasers: third persons without notice, in whose favor the equity of the court is invoked.

We are in possession, in good faith, with the consent and acknowledgment of the adverse party; with no view to speculation; but for actual cultivation. And now, what is the court required to do for the protection of those innocent parties?—To revive an obsolete title, dug up from the archives, where it has been forty years dead and buried; to turn us out of possession, older than their title; which has continued longer than theirs has been forgotten.—In fine, to make a most extensive injury and wide ruin upon the warrantors.

2d. The defendants have acquired a right by prescription.

The law of our code is taken from the law of France; which does not differ from the civil law, which was adopted in the laws of Spain.

Any title with good faith, and ten years public possession, or thirty years without title or good faith, acquires a good title.

The recognitive act of Mad. Lessassier, in 1804, is a good basis of prescription for ten years. It was such a title as made the party believe in his conscience that he had a title. It matters not who had the legal title; or whether she had any; or whether it is good as a recog-

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nitive act. It is sufficient that it purports to be a sale of eighty arpents on both sides of the Teche. More than ten years have elapsed from 1804 to the commencement of the suit.

Possession of any part of a title, is possession of the whole. It remains then only to shew possession. There was a continued possession by Lessassier, from 1776 to 1780, in which last year Macarty took actual possession, and occupied it until 1785 or 6. This is confessed by La Houssaie. He then had a natural possession of the land; which continued in him until interrupted by an adverse possession of the same kind, which adverse possession was never taken. After that he had the land surveyed; paid taxes regularly, under the Spanish government; sold the land to Prevost, who again went into actual possession, and thereby united the present with the former possession; and the law considers them to have been always in possession. The recognitive act shews that Macarty was not a trespasser, or a squatter, even if the parol evidence is excluded. But the possession of Macarty began more than 30 years ago. After 30 years, the law presumes title and good faith.

We cannot, therefore, question the founda-

tion of his title. He therefore had a good title from the beginning, which with the *possession*, continued without interruption. In 1804 he was in the natural possession, by operation of law. He then acquired another title, confirmatory of the first. His natural possession has continued ever since. He has then had ten years possession, under a good title, and in good faith. The title and the possession are established by the confession of La Houssaie.

But the recognitive act, dispenses with the production of the original title, if it relates its tenor, *Code* 308, *art.* 237, and supplies its place.

It is good evidence that the title and the possession, were in the beginning legal and in good faith, for eighty arpents on both sides.

It is therefore a good basis of prescription of thirty years; and the possession is established by evidence. The recognitive act of Madame Lessassier, if not good for the heirs, (who do not appear dissatisfied,) is at least good for half, which justly belonged to her in the community. But can it be said, that a title of forty years standing, cannot be recognised even by oath, between the parties and their heirs, when lost; when by the effect of time only, we are

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dispensed from shewing title, or of proving it; when the acknowledgments of the party would be good; and when the conversations of dead men are given in evidence?

Here the object of the sale is, merely to shew the *quantity of the land* held; not to establish a title—which is presumed.

Parol evidence, and conversation, are good proof of boundaries: Why not of quantity and extent? But La Houssaie acknowledges our boundaries on both sides of the bayou. Recognitive acts, whether they relate the tenor or the substance of the primordial title "*Interrompent bien la prescription. Ferriere Dic. de Droit.*

It is confessed by La Houssaie, that we purchased of Lessassier eighty arpents on each side of the Teche; and had possession from 1776 until that time. It has been established by unquestionable evidence, that we purchased eighty arpents front, on both sides of the Teche.

This has in effect been acknowledged by the only person having an adverse interest. It is confirmed by the written act, and the oath, of those who hold the rights of our vendor. We have shewn continued occupation. That we took possession by actually surveying eighty

arpents. That we paid the taxes regularly. We shew that on the west side, there was no wood; and that the east side was necessary to us. It was the usage of the country to hold on both sides. One had no value without both. We made ways to cross the bayou, cut our wood, and even made corn one year on the east side. But we have not produced our title. It would be wonderful, if it had survived 40 years, under the circumstances of the country and the habits of the people.

We have shewn that Macarty's house was destroyed, with all personal property and papers, with a portion of the city of New Orleans.

By the French law, the conflagration of a house, a ship-wreck, a robbery, are events that suffice to prove the loss of papers, because the loss is rendered probable by the event. Why is a party held by such strict rules to shew his title? It is because its being withheld is a presumption that its suppression is beneficial. But here is the declaration of Macarty, many years ago, before there could be any expectation of this suit, that the title was lost; when no person claimed; when the land was of little value; and when it was easy to renew his title. Is not the destruction of his house evidence of

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the loss of his papers? This is corroborated by his declaration; and above all, he cannot prove it, in the nature of things, in any other mode. If this is not good evidence, you must not only shew a fortuitous event or *force majeure*, but you must shew, that the particular paper was lost. If this could be proven, it would be only by an eye witness; and this must rest upon the credit of a witness, who is not more credible than the witnesses who attest the existence of our title. The law must have a reasonable and sensible construction, or it will exclude all evidence of the loss of papers, and render the law nugatory. We must relax the rule in proving the loss, but increase the strictness in proving the contents—as the court have done in the case of *Nagel* vs. *Minot*, 7 & 8 *Martin*.

Judice deposes to a public sale of forty arpents. This is clearly not the sale mentioned by the other witnesses, and does not contradict their testimony; it merely shews that we had two. Judice is not necessarily mistaken; both are true and reconcileable.

We have satisfactorily shewn, that the title was lost; but Macarty did not, at that time, recollect this paper. But afterwards, when

searching for it, it was discovered to be lost. He could not, after such a lapse of time, (16 years,) recollect, that this paper was among his private papers in his house when burnt. But it occurred to him that it might have been deposited in Pedesclaux's office; and not finding it there, he petitioned the intendant; and stated it had been mislaid. If he had intended any fraud or concealment, it was sufficient, and much more easy, to have stated that the paper was lost, at the time his house and papers were destroyed. But not knowing the fact distinctly, and having an impression on his mind that it had been left in the office, and that, as it could not be found, he thought it must have been *mislaid*.

The existence of a sale for this land has been proven by the testimony of too many and too respectable witnesses to be doubted. It is corroborated by his possession, his survey, his declaration, his payment of taxes, his continued claim, and the general understanding of the country; and above all, by the oath and recognitive act of Madame Lessassier, and the oath and confession of La Houssaie himself. If all this evidence is true, he can have no motive to withhold this sale. If it is untrue, and we can

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be deceived by such a mass of testimony, it is in vain to rely upon any evidence, to prove the loss of the title.

There is a strong presumption of the loss of the sale, as it is of the highest importance to him to produce it. The loss of the house accounts for the loss of the paper. It creates an irresistible presumption that it was lost then; although not distinctly recollected. But if it was true, that the paper was deposited in the office, and mislaid, he is equally entitled to prove the loss, and the contents of the deed.

It was enough for Macarty's heirs here to prove the conflagration. That meets the views of the legislators in France. The presumption arising from this event is full proof of the loss. But the defendants were desirous of doing more; they desired also to shew, that the loss had been known before any suits were anticipated.

In the petition to the intendant, the loss was the material fact; the manner was unimportant. Does not the declaration, so many years before this suit, strongly support the presumption of loss? And can a mistake or inadvertence, arising from the memory of a simple fact, many years after the loss, destroy the full

proof? Suppose the paper lost in the public office, which may happen, and there is no fortuitous event, is there no remedy? Must he be held to prove a *force majeure*, when none was applied? a fortuitous event, when none has happened—and that it was unforeseen? Papers are rarely lost by an *event*: they are more frequently mislaid, or dropt, or misplaced, or stolen—at what time, place, or manner, is entirely unknown.

It may never occur again in this state, that the loss of a paper can be accounted for according to the terms of the law. I have lost important papers, that I cannot account for. I have known them taken from the records of a court; nobody could tell how or when—and yet, is such strictness to prevail that my rights must be lost, unless my house has been burned, or I have been robbed or shipwrecked? The liberal relaxation of the rule, in the case of *Nagel* vs. *Minot*, (8 *Martin*,) will be found necessary, to give a salutary effect to the law. It is quite as easy to prove the fotuitous event, as to prove the contents of a deed: and those who design to accomplish their fraudulent purposes by perjury, will evade with ease, the provisions of the law—while every honest man

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in the community will be the victim. Let it appear, by the best evidence the case admits of, that the paper is lost; but require strictly the evidence of the contents. Here I may be permitted to add, that after forty years, the deed proves itself. It is therefore easier to make a false sale than to prove the contents by witnesses. A deed of forty years old depends more on the possession which accompanies it, than the possession does upon the deed. It is not even necessary to prove that the signatures are genuine. In this case the evidence of the existence of the sale from Lessassier to Macarty, and the contents, are more satisfactorily established than it would be by the deed itself.

I conclude that the loss of this sale is accounted for; that its contents are duly proven. That Lessassier had eighty arpents on both sides of the Teche; that he had an actual possession, from 1776 to 1785 or 6; that the natural possessson continued until the defendants entered; that we have had forty years possession, and therefore have a right to hold by prescription.

Bullard, for the plaintiffs. In my argument in this case at a former term, I was willing to

take the appellees at their word, and to suppose, that no conveyance ever existed from the original grantees to De la Houssaie, pére. I was disposed to concede, for the sake of argument, that it was all an error; and on that supposition, endeavored to shew that our rights would be incontestible. But we are now told, that we must not gainsay our own deed; that we must hold by the recognitive title, purely as such, or not at all.—Be it so. Permit me then to inquire into the nature and effects of such acts.

Much learning has been exhibited, to shew the difference between recognitive acts, *in certâ scientiâ*, and those in *formâ communi*. The former are said to dispense with the production of the primordial title: the latter to confirm it, only so far as it may have existed.—Such is the doctrine of Pothier, and such the provisions of our code. By this I understand nothing more than, that when I demand the performance of a stipulation from the obligor, and in support of my claim, I furnish no other proof than a recognitive title in *formâ communi*, he may deny the existence of the primordial title; and I must then produce it, or account for it. But if the act should be *in certâ sci-*

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entid, and sets forth the tenor of the primordial title, it amounts to full proof; and I need not produce the original. But how do these principles apply here? If the heirs of the grantees were in possession of the land, and we had demanded to be put in possession, by virtue of this act, they might well say, "here is an error of fact; produce the primordial title; we have since discovered that none such exists." But here the contrast is consummated. The heirs of Davis are to the whole world the successors by particular title of the grantees. There is no dispute about it. Third persons cannot contest the fact.

Supposing then de la Houssaie père, the owner in his lifetime, how is his declaration before the land commissioners to operate? This brings us to the point on which this cause is supposed to hinge.

We contend that it ought not to have been allowed in evidence. 1st. Because its authenticity is established only by an *ex parte* affidavit. 2d. Because it purports to be a copy of a deposition, and is not proved according to law. See *Phillips's Evid. p.* 292. The *existence* of the original document is proved by one person who was not called as a witness; its genuine-

sess is not established at all. The *jurat* to the original appears to be certified by R. Eastin, who must consequently have seen it signed—he is not called as a witness. Mr. Wailes could have known nothing of it, except through the return to the dedimus. The admission of that document was excepted to; and we are entitled to all legal objections, in this court.

Admitting that it was properly given in evidence, how does it affect the rights of the parties? It is treated as a confession, which will preclude him and his successors from claiming the land. By one of the counsel it is considered as judicial; by another as extrajudicial. It is clearly not a judicial confession, as it was not made by a party *en jugement*. The land commissioners may be a court; but De la Houssaie was only a *witness*. If it be entitled to the name of a confession, it is evidently extrajudicial, and consequently, is not in itself conclusive, *even against the party making it*. See *Merlin Rep. verbo Confession*.

But I consider it *parole*. Its being noted down, does not make it written evidence. The testimony of a witness, taken on commission, does not become more or other than testimonial proof. If he, as a witness, could not

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establish title to real estate, it is difficult to conceive how he could do more by having his testimony written down by a commissioner? If this declaration was considered at first as testimonial, it is still so: It was so considered by the commissioners, and the claim was rejected.

It is said by the counsel for the appellees, to be at least equal to an act *under private signature*, containing an express *relinquishment* of title in favor of Macarty, not recorded. I am always happy to take the gentlemen at their word. And let us, for the sake of argument, consider it as such, in express terms. It is admitted to be null, as to third persons, unless recorded. The heirs of Davis, whose ancestor purchased without any notice of that act or declaration, who purchased in good faith, are third persons, and innocent purchasers, and consequently not excluded by it. The provisions of our code are explicit on the subject. *Civil Code, 306, art. 224–8.*

It must seem that if De la Houssaie himself had sold to Davis by authentic act, he would have taken in preference to a previous purchaser by private act not enregistered according to law. It is not pretended that he would be prejudiced by a previous clandestine sale.

But the act, (says the gentleman,) would be conclusive against the heirs; and as they inherited nothing, they could sell nothing; and consequently, although according to their argument, the heirs may be ignorant of the private sale, as well as a subsequent purchaser from them by authentic act, the previous private sale by the ancestor would prevail, and be conclusive against the vendee of the heirs.

It is difficult to see how the two cases can be distinguished in principle. If A. sells to B. by act *sous seing privé*, he has nothing left to sell to C. by authentic act; and he can sell no more than he has. Yet it is admitted, (Toullier notwithstanding,) that C. would hold. But the heir of A. must be entirely ignorant of the previous sale of his ancestor, and sell in good faith; shall C. not be protected? It is said not; because the first title, *sous seing privé*, is conclusive against heirs.—Not more so, I should suppose, than against the party himself. And if a good title could be acquired from him, acting basely and fraudulently, it is difficult to conceive why it could not from the heir, who acted in good faith. In both cases C. is equally a stranger, a third person, as relates to the first purchaser, and to the act *sous seing privé*. The

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heir is seized, by the death of the ancestor; he is considered by the whole world as the owner of the estate. If he does not avail himself of the benefit of inventory, he is personally liable for the debts. The property he inherits is blended with his own; and is as much his, as if he had acquired it by purchase.

Suppose a private mortgage by the ancestor, not recorded; the heir in possession of the hereditary estate, mortgages it to another, by authentic act; which mortgage would take the precedence? The first would be a valid mortgage as to the heir; he cannot contest it; but it shall not take precedence of the second, because the second mortgagee was ignorant of its existence; was a stranger to the act, though he held under the heir, against whom that act is said to be conclusive. With respect to the first mortgage, he is a third person. 6 *Merlin, Questions de droit, p.* 388. *verbo Tiers.*

But it is said, we had notice of the adverse possession; and are not innocent purchasers. It is true we are accused of acts of trespass committed on the land, under a pretended claim of Lessassier, which had been rejected by the commissioners. It is true, we expected to contend against wealth, and local influence;

the ingenuity and learning of distinguished advocates. It is true, we supposed the adverse party would cling to this cause to the last; and that the struggle would be protracted, expensive, and vexatious. But we had no suspicion all this time, that they claimed under our vendors, or their ancestor. It is but recently they have made the discovery themselves. Nothing is said of it in the pleadings. And last year, a long and learned argument was furnished to the court, to prove that De la Houssaie, whose title they now pretend to hold, never had any right at all. On application to the land office, we were assured that no title existed out of the domain, except in favor of Dugats and Labauve. That the pretended title of Macarty was founded on parole evidence; and was rejected. We had a right therefore to consider Macarty as a trespasser on the grantees, or a squatter on public land. Shall he now be permitted to change the character of his own possession?

But the counsel asks of the court to establish constructive notice, in lieu of that demanded by the statute; and many decisions are referred to in which judges considered, that notice by registry may be dispensed with in particu-

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lar cases. The equitable powers of these judges may have authorised them to change or abrogate particular provisions of positive law. But if this court pursue uniformly the same rule of construction; they will say, "we cannot disregard the letter of the statute, under pretence of pursuing its spirit." We cannot substitute one species of notice for another; we cannot say that notice can be dispensed with in particular cases, on equitable grounds. At any rate, this is not one of the cases in which even those judges would have decided so; because those who claim under Macarty never pretended to have derived any right through De la Houssaie; but, on the contrary, have uniformly, constantly, pertinaciously denied any right, title, or interest in De la Houssaie, or those under whom we hold. Take the rule as laid down by Judge Parker, (6 *Mass.* 487,) referred to by the counsel: "Where a *bonâ fide* purchaser of land enters *under his deed*, and continues in open possession of it, a second purchaser cannot avail himself of the first purchaser's neglect to register his deed." In the case before the court, did they enter under the declaration of De la Houssaie? Have they not, on the contrary, disclaimed any pretence

of the kind; and persisted in an exploded and unfounded claim of Lessassier?

On the second branch of the case, to wit, the plea of prescription, I have little to add in reply to the arguments urged by the adverse counsel. It is most evident that the appellees cannot connect their possession with that of Lessassier; and make out a prescription of thirty years. Our grants are dated in 1777, and the commandant certifies, that he had put the grantees in possession of the land. Any possession adverse to his, was a trespass. There is no legal evidence of any title in Lessassier; and his possession, such as it was, extremely equivocal, was abandoned, and in law the grantees were still considered possessed.

The principles of law on which the question of thirty years' prescription must be determined, have been settled by this court, in the case of *Prevost's heirs* vs. *Johnson*, 9 *Martin*, 183.

On the ten years prescription, it appears to me, that the appellees have but feeble hopes. The recognitive act of Madame Lessassier is not *translatif de propriété*, and therefore cannot form the basis of ten years prescription. Even if it might be so considered, the evidence

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shews possession under it on the west side of the bayou, for only five or six years before the institution of this suit.

To conclude, (for I feel that I have troubled the court too long, on a subject which has been so fully discussed,) I have endeavoured to shew:—

1st. That the declaration of De la Houssaie ought not to have been received in evidence; not because it is in itself *ex parte*, but because its existence and authenticity is proved only by an *ex parte* affidavit.

2d. That it is to be considered only as parole, and not therefore admissible to establish or destroy title to real estate. 6 *Johnson's Rep.* 19.

And 3d. That if it is to be regarded as a written disavowal on the part of De la Houssaie, it is a private paper, not recorded, and not conclusive on us as third persons.

Having shewn a title of the highest dignity out of the crown, and deduced a chain of conveyances from the original grantees, we are entitled to recover, unless the defendants can shew a better title; that ours has accrued to their benefit; or that we have lost it in the lapse of years.

It being suggested that facts which the record left doubtful, might be fully established, by remanding the case for a new trial, it was, by consent, accordingly so done.

*** *There was not any case determined in either of the months of October or November.*